

The Association of the Bar  
of the City of New York  
November 28, 2007

THE ROLE OF JUDGES IN A GOVERNMENT  
OF, BY, AND FOR THE PEOPLE

*Notes for*

The Fifty-Eighth Cardozo Lecture

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Remarks of Senator Edward M. Kennedy

*58th Annual Benjamin Cardozo Lecture at the Association of the Bar of the City of New York*

*November 28, 2007*

I'm honored to participate in this special occasion in this Great Hall, and I wish very much that I could be there in person.

It's a privilege to introduce this year's Cardozo Lecturer, Judge Jack Weinstein. The annual Cardozo Lecture is one of the nation's most prestigious honors, and it's fitting that it's being given this year by one of the nation's most prominent jurists. Jack Weinstein has graced the Federal Bench in New York for forty years, and is renowned for his intelligence, dedication, integrity, and sense of compassion. His ability and commitment to the law are remarkable, and he certainly ranks among the nation's finest jurists, in the great tradition of Benjamin Cardozo.

In many ways, his life is the story of the American Dream—born in Kansas—took a job in Brooklyn at 17 as clerk for Byrnes Express Trucking Company—rose to manager while earning his B.A. degree at night at Brooklyn College—served in the Naval Reserve in World War II—came home to earn his law degree at Columbia, and went on to a brilliant legal career, including service as a member of the legal team in *Brown v. Board of Education*.

There is hardly any area of the law on which Judge Weinstein has not had a profound impact far beyond his courtroom in Brooklyn. Whether the issue is torts, civil or criminal procedure, criminal law, or sentencing offenders, his expertise is legendary. He's been a pioneer on mass tort litigation involving Agent Orange, asbestos, and tobacco, and his textbooks on evidence and on civil procedure are classics frequently cited by the Supreme Court—sometimes by both the majority and dissenting opinions in the same case.

In his brilliant career, he's been a superb lawyer, a respected member of the faculty at Columbia Law School, and for the past four decades an excellent federal judge. Throughout his extraordinary career, he's always put the public interest first, and he's often been called the nation's judicial conscience.

Needless to say, the Kennedy family has also relied on his wise counsel and sound judgment. When my brother Robert Kennedy was a Senator from New York, he wisely sought out Jack for legal and political advice, especially on state reapportionment in the 1960s and the political minefield at the New York State Constitutional Convention. When a federal court vacancy for the Eastern District of New York became available in 1967, Bobby urged President Lyndon Johnson to nominate Jack, and the rest is history.

I too have frequently relied on Jack over the past forty years as a member of the Senate Judiciary Committee. On issues such as criminal code reform, bail reform, and the federal law on criminal sentencing, he has always been extremely knowledgeable and far-sighted.

I commend the City Bar Association for honoring Jack as this year's Cardozo Lecturer. Benjamin Cardozo would be proud of Jack for all he's accomplished for the people of New York, for the nation, and for the rule of law. I'm proud to introduce him now—the Honorable Jack B. Weinstein.

## Response to Senator Edward M. Kennedy

I am most grateful for Senator Kennedy's overly generous words. It is a matter of great regret that he could not be here tonight. We had hoped that he would participate in this discussion, applying to the Congress—as I plan to do to judges—Lincoln's description of a government “of, by, and for the people.”

Senator Edward M. Kennedy is the modern manifestation of Senator Daniel Webster—or perhaps Webster was the earlier version of Kennedy. Webster represented Massachusetts during the years 1827 to 1850, not quite a quarter of a century. By contrast, Edward Kennedy has represented the Commonwealth for what is nearing half a century.

Lincoln admired Webster. Both would, I believe, have supported Edward Kennedy's continuing battle for the oppressed and for the future of our great Republic.

There were three national political figures—contemporaries of mine—who bear mention for engaging in our continuing struggle for equality and liberty for all. Their deaths touched the nation's heart.

President Franklin D. Roosevelt's passing was announced on the loudspeaker of a naval vessel I was aboard at Midway. His work was largely done.

Word of President John F. Kennedy's assassination was communicated to me by the head of the Nassau County Police, since I was then County Attorney. There was an immediate and pervading fear for our nation's safety. I called together my staff, told them what had happened and asked them to pray for our country. President Kennedy, then in his prime, was making contributions of enormous importance to our people; his death changed the lives of each of us.

When Senator Robert F. Kennedy was assassinated I, like others, despaired. I had

worked with him. I am convinced that were he to have lived, our country would be a better one. Robert Kennedy's life was pregnant with an unrealized potential for good for many. That too might have been said of Lincoln, so shockingly murdered as the nation faced a crisis more challenging than the Civil War: peace, reconciliation and integration of the former slaves as free men and women into our society, economy and political life.

This lecture is dedicated to Robert F. Kennedy.

### Acknowledgements

In preparing these materials I have had the benefit of all of my many present and former law clerks' instructions over the years. For help with these notes I am particularly grateful to Zainab Ahmad, Professor Margaret A. Berger, Professor Anita Bernstein, Meredith S. Cohen, Judge Denise L. Cote, Anya Emerson, Professor Marc Falkoff, Muhammad U. Faridi, Toi Frederick, Professor John Goldberg, Leila Hull, Professor Michael Perry, Dean Joan G. Wexler, Christopher Wimmer, and Margaret Winterkorn-Meikle.

## I. Introduction

My subject is the role of the courts in what Lincoln described as a “Government Of, By, and For the People.” We steer towards our destination—equal justice for all—guided by Lincoln’s glowing verbal constellation. In some ways our judges are veering off course.

Under Article III of the Constitution a district judge has, with limited exceptions, the same powers and responsibilities as an appellate judge in interpreting the law, including the Constitution.<sup>1</sup> General conclusions on how *nisi prius* judges—both state and federal<sup>2</sup>—interpret

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<sup>1</sup>LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 253 (2004) (“[L]ower court judges now see themselves in relation to the [Supreme] Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions—an actual authority, too, not some abstract ‘people’ who spoke once, two hundred years ago, and then disappeared.”). *But see, e.g.*, The Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (1996) (“clearly established federal law, as determined by the Supreme Court”); Muhammad U. Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(d)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361 (2007).

<sup>2</sup>So far as most lay people are concerned, the state and federal systems are one judicial establishment with many courts. *See* Jack B. Weinstein, *Coordination of State and Federal Judicial Systems*, 57 ST. JOHN’S L. REV. 1 (1982); M. Somjen Frazer, *Examining Defendant Perceptions of Fairness in the Courtroom*, 91 JUDICATURE 36 (2007) (local courts to determine general perceptions towards criminal justice systems). I have tried, particularly in mass tort cases, to cooperate fully with state judges and to coordinate our work. For example, in the breast implant cases a judge from another district and I decided *Daubert* motions together. *See* Barry Meier, *Judges Set Up Review Panel for Lawsuit on Implants*, N.Y. TIMES, Apr. 4, 1996; *see, e.g., In re Breast Implant Cases*, 942 F. Supp. 958 (S.D.N.Y. 1996). In the asbestos cases coordination was obtained by appointing me to sit in two districts. *In re E. and S. Dist. Asbestos Litig.*, 772 F. Supp. 1380 (S.D.N.Y. 1991). In these cases, Justice Helen Freedman of the Supreme Court of the State of New York and I sat in cooperation to decide motions. In *In re Zyprexa*, 04-MD-1596, a Multidistrict Litigation assigned to me, special masters and I attempted to integrate our work with many state courts and administrative agencies. In the *DES* litigation a state judge and I appointed the same person to act as a special master/referee to supervise discovery and settlement. *In re New York County DES Litig.*, 142 F.R.D. 58 (E.D.N.Y. 1992). In criminal cases I have tried to utilize state courts and agencies to reduce unnecessary prison

and apply the Constitution and other laws must, therefore, be addressed.<sup>3</sup> What I have to say about appropriate judicial policy applies to all judges.<sup>4</sup>

First I want to try to explain why the Cardozo Lecture is such an overwhelming honor. Then I will indicate why I think Lincoln's words point us to the legal profession's polestar—justice under the law *for all*. That will require parsing the words “people,” “of,” “by,” and “for.”

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terms.

Cooperation with local social service agencies as part of this integrated view of the court structure is important. *See* BROOKLYN BUREAU OF CMTY. SERV., FREE, VOLUNTARY COUNSELING FROM THE BROOKLYN BUREAU OF COMMUNITY SERVICE (pamphlet for litigants in the Eastern District “under stress,” offering counseling financed by the Eastern District Civil Litigation Fund that I founded and financed some years ago). Our Probation Office uses local social and medical sources extensively.

<sup>3</sup>Some Constitutions of other nations limit power to decide constitutional issues. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 250 (2004) (“Recognizing that constitutional enforcement is not and never could be like ordinary legal interpretation, the post-World War II constitutions of Europe established special courts, not part of the ordinary legal system, whose sole function is to review constitutional questions. Given the high political station these courts occupy, additional safeguards were added to ensure an appropriate level of political accountability without needlessly compromising judicial independence. Appointment to the bench thus typically requires a supermajority in one or both houses of the legislature, guaranteeing that constitutional courts have a mainstream ideology, while judges serve terms that are limited and staggered to ensure a regular turnover. In addition, the constitutions themselves are more easily amendable than ours. The combined effect of these innovations is to relieve the pressure a doctrine of supremacy creates by reducing the likelihood of serious breaches between the constitutional court and the other branches of government, and by making political correctives easier to implement when breaches occur.”); *see also* Barak Medina, *Introduction: Constitutionalism and Judicial Review in a Rifted Democracy: Symposium on Jeremy Waldron’s Law and Disagreement*, 39 *ISR. L. REV.* 6, 8 (2006) (“fierce debate over . . . the legitimacy of judicial review” of validity of legislation); Moussa Abou Ramadan, *Notes on Shari’a: Human Rights, Democracy, and the European Court of Human Rights*, 40 *ISR. L. REV.* 156 (2007).

<sup>4</sup>As law clerk to the great Stanley H. Fuld, Judge and then Chief Judge of the New York Court of Appeals, I had ample opportunity to check this conclusion. *See, e.g.*, Jack B. Weinstein, *The Honorable Stanley H. Fuld*, in 2 *HISTORICAL SOCIETY OF THE COURTS OF THE STATE OF NEW YORK* 1 (2004).

Some discussion and examples follow on why and how following Lincoln requires: first, an expansive view of the meaning of “people;” second, reducing restrictions on access to the courts; third, clearing barriers to participation in government; and fourth, helping the disadvantaged.

## II. Why a Lecture in the Association's Great Hall Is So Great An Honor

When I was law clerk to Judge Stanley Fuld in the 1940s, his chambers, which were next door in the Bar Association, were those Justice Cardozo once occupied. From time to time veneration lured me down to the basement files of the beautiful Albany Court of Appeals to physically touch Cardozo's manuscripts. Unfortunately, those tactile connections did not improve my writing.

Before computers, the Association's enormous library was my treasured resource.<sup>5</sup> After the library closed for the night I would carry books through the back halls to the Bar's building, working through the night, trying vainly to measure up to the standards of Cardozo and Fuld. In the dawn, my manuscript on Fuld's desk, I would walk down fresh-washed glistening Fifth Avenue (the streets were flushed then rather than swept) to our tiny apartment at London Terrace on 23rd Street, and the arms of Evie and our wondrous first born.

As a private practitioner, when I had my tiny office on 42nd Street and Lexington Avenue, it was to this Association that I fled to work on briefs. Here, as a young lawyer in the early fifties, I had the privilege of working on committees with Harry Tweed, Colonel Jack

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<sup>5</sup>With computers, judges now have ready access to the law's treasures, and a greater opportunity to inform themselves about the economic, political and social background of cases before them—information necessary to make sound decisions. *See, e.g.*, Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L. REV. 539 (1999); Jack B. Weinstein, *Learning, Speaking and Acting: What are the Limits for Judges?*, in CRIMINAL JUSTICE—CONCEPTS AND ISSUES—AN ANTHOLOGY 195 (Chris W. Eskridge ed., 2d ed. 1997); Jack B. Weinstein, *Limits on Judge's Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1 (1994); Jack B. Weinstein, *Learning, Speaking, and Acting: What are the Limits for Judges?*, 77 JUDICATURE J. 322 (1994); Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263 (2007).

Dykman, Judge Sylvia Jaffin Liese and so many other generous lawyers, who persuaded youngsters like me, through example, that with good luck we might ultimately practice law in their great tradition, improving society. It was here in the same library and in the nearby NAACP Legal Defense Fund offices that I contributed menial help to Thurgood Marshall's team in *Brown v. Board of Education* and other cases, and did some of the work for Nassau County and the New York State Democratic Party on one person, one vote and reapportionment.

Entering this building in the forties and fifties, when we were still heady from having defeated the tyrants threatening the world, you could almost feel the fluted pillars humming, "liberty, equality and justice for all."

### III. Prior Cardozo Lectures

This is the fifty-eighth Cardozo Lecture. Four particularly resonate with Lincoln's words. The first was by Chief Justice Earl Warren in 1970 titled "All Men Are Created Equal." His era abolished forced segregation in *Brown*,<sup>6</sup> outlawed state compelled housing discrimination in *Shelley v. Kraemer*,<sup>7</sup> and gave us *Miranda* among other reforms to help bring constitutional rights to the accused,<sup>8</sup> provided for one person, one vote,<sup>9</sup> struck down miscegenation laws,<sup>10</sup> and made other powerful and necessary reforms.<sup>11</sup> Chief Justice Warren began his Cardozo Lecture by declaring:

I believe that if Justice Cardozo were here today his concern would be whether . . . [we] are headed toward the great American ideal expressed in our Declaration of Independence 194 years ago that "All men are created equal, and that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."<sup>12</sup>

And he ended: "It is not enough merely to open the courthouse doors to everyone. The proceedings . . . must . . . be open on equal terms to all who enter; otherwise the word 'justice' is

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<sup>6</sup>*Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), 347 U.S. 483 (1954).

<sup>7</sup>*Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

<sup>8</sup>*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>9</sup>*Baker v. Carr*, 369 U.S. 186, 208 (1962).

<sup>10</sup>*Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>11</sup>See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997).

<sup>12</sup>Earl Warren, Chief Justice, U.S. Supreme Court, All Men Are Created Equal, The Association of the Bar of the City of New York, Benjamin N. Cardozo Memorial Lecture (1970), in 2 BENJAMIN N. CARDOZO MEMORIAL LECTURES 921, 926 (1995).

a sterile one which cannot command the respect we claim for it.”<sup>13</sup>

The second was by my classmate, Columbia Law Professor Jack Greenberg, formerly the director of the NAACP Legal Defense Fund, whose books and briefs elevated minorities and their rights. His topic was “Litigation for Social Change: Methods, Limits and Role in a Democracy.”<sup>14</sup> Defending the use of courts to help the oppressed, he concluded, “litigation for social change . . . has provided a way to satisfy the just aspirations of those who have been unable to get things done through other channels of government.”<sup>15</sup>

The third was by Justice Ruth Bader Ginsberg, a former student of mine and colleague at Columbia, whose topic was “Affirmative Action: An International Human Rights Dialogue.”<sup>16</sup> She supported “affirmative action, as anchored in the Universal Declaration of Human Rights, as the idea is unfolding in the United States, and elsewhere in the world.”<sup>17</sup> As she put it, “[w]e are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities and other disadvantaged groups.”<sup>18</sup>

Her view is supported by the historical fact that the State Department and the Department

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<sup>13</sup>*Id.* at 938.

<sup>14</sup>Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in a Democracy*, The Benjamin N. Cardozo Memorial Lecture (1973), in 3 THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BENJAMIN N. CARDOZO MEMORIAL LECTURES 999 (1995).

<sup>15</sup>*Id.* at 1053.

<sup>16</sup>Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *Affirmative Action: An International Human Rights Dialogue*, The Benjamin Cardozo Memorial Lecture (1999), in 21 CARDOZO L. REV. 253, 260 (1999).

<sup>17</sup>*Id.* at 253.

<sup>18</sup>*Id.* at 282.

of Justice understood that legal segregation before *Brown* hurt our image and hobbled our diplomacy around the world. This was an important factor, I believe, in the government's support of *Brown*.<sup>19</sup> We are increasingly a part of the world not only in our economy, but in our law of civil and human rights. The impact of Western nations' objections to the death penalty may well have contributed to acceptance of Supreme Court decisions prohibiting it for those under eighteen and for the mentally disabled.<sup>20</sup>

Finally, there was Eric Holder, Jr., in the fifty-third Cardozo Lecture in 2001 on "The Importance of Diversity in the Legal Profession."<sup>21</sup> His history of modern efforts to provide an integrated bar devoted to helping the disadvantaged ends with a Lincolnesque plea, "I implore you to join together in making the elusive dream of 'One America' a concrete reality."<sup>22</sup> He rightly warned that substantive rights cannot help the disadvantaged poor without skilled legal help.

Now to Lincoln's guiding ideals.

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<sup>19</sup>MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 9 (2000); *see also* Beharry v. Reno, 183 F. Supp. 2d 584, 597, 600-02, 603-05 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51, 53 (2d Cir. 2003) (relying on international treaties to defend the rights of aliens the government sought to deport).

<sup>20</sup>KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 157-60 (2006); (discussing reference to foreign law in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002)).

<sup>21</sup>Eric Holder, Jr., *The Importance of Diversity in the Legal Profession*, The Benjamin Cardozo Memorial Lecture (2001), in 23 *CARDOZO L. REV.* 2241 (2002).

<sup>22</sup>*Id.* at 2251.

#### IV. “Of,” “By,” and “For” the “People”

Abraham Lincoln’s concluding words in his Gettysburg Address were: “Government of the people, by the people, for the people, shall not perish from the earth.”<sup>23</sup> In this speech he encapsulated the visionary history of this country. He integrated its founding documents, the Declaration of Independence and the Constitution. He defined our ideals. He plotted the future course of our law.

The phrase itself was not coined by Lincoln. An abolitionist preacher, Theodore Parker, often used the refrain, “government of all, for all, and by all.”<sup>24</sup> Senator Daniel Webster relied upon similar language,<sup>25</sup> as did others.<sup>26</sup>

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<sup>23</sup>ABRAHAM LINCOLN, Address Delivered at the Dedication of the Cemetery at Gettysburg (1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., 2d ed. 2001).

<sup>24</sup>GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 107 (1992); PHILIP B. KUNHARDT, JR., A NEW BIRTH OF FREEDOM: LINCOLN AT GETTYSBURG 60-61 (1983); BENJAMIN BARONDESS, THREE LINCOLN MASTERPIECES: COOPER INSTITUTE SPEECH, GETTYSBURG ADDRESS, SECOND INAUGURAL 41 (1954) (suggesting that the origins of the phrase originated from one of Parker’s sermons); MICHAEL LIND, WHAT LINCOLN BELIEVED 46 (2004) (quoting Parker, a well-known nineteenth century Bostonian, as having written, “[d]emocracy is direct self-government, over all the people, for all the people, by all the people.”); *see also* GABOR BORITT, THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS 256 ff. (2006) (noting that the phrase “of the people, by the people, for the people” was caught in all press accounts as well as the extant texts).

<sup>25</sup>

[Lincoln’s] conclusion echoed not only Weems’s *Life of Washington*, but words memorized by generations of children from their readers—some of the best known words of American history, and of Lincoln’s youth, the conclusion of Webster’s 1830 reply to South Carolina’s Robert Hayne in the Senate, denying that the U.S. government was a “creature” of the states. It was “the people’s government,” Webster had said, “made for the people, made by the people, and answerable to the people.”

Lincoln’s use made the phrase iconic. He relied upon the words “of,” “by,” “for,” and “people,” not only for their alliterative quality, but for their historic truth and analytic power. This was a speech—among the greatest ever delivered—by a skilled lawyer<sup>27</sup> summarizing in less than a thousand words the history, guiding principles and future of this nation. We must not forget that Lincoln was a poet and a prophet<sup>28</sup> in the Old Testament tradition.<sup>29</sup> The words

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GABOR BORITT, *THE GETTYSBURG GOSPEL* 121-22 (2006); *see, e.g.*, 1 CLAUDE M. FUESS, *DANIEL WEBSTER* 379 (1968) (quoting Daniel Webster’s Second Reply to Hayne during the 1830 Senate debate where Webster defended the supremacy of the Union states, declaring that the national government is “a popular government, erected by the people; those who administer it, responsible to the people”); *id.* at 382 (“[A] popular government, founded in popular election, directly responsible to the people themselves”). Lincoln was aware of, and affected by, Webster’s speech. *See* ROBERT REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 331, 374 (1997); *see also* MICHAEL LIND, *WHAT LINCOLN BELIEVED* 46 (2004); BENJAMIN BARONDESS, *THREE LINCOLN MASTERPIECES: COOPER INSTITUTE SPEECH, GETTYSBURG ADDRESS, SECOND INAUGURAL* 41 (1954).

<sup>26</sup> John L. Haney discusses in great detail how various historical figures have used different formulations of the phrase “of the people, by the people, for the people.” For example, Justice Joseph Story, in his 1833 book *ON THE CONSTITUTION*, describes “a government like ours founded by the people, and managed by the people.” John L. Haney, *Of the People, By the People, For the People*, 88 *PROC. AM. PHIL. SOC’Y* 359, 364 (1944). Haney also quotes Chief Justice John Marshall’s majority opinion in *M’Culloch v. Maryland*, 17 U.S. 316 (1819), where Marshall “wrote: ‘[t]he government of the Union is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit.’” *Id.* at 363. Haney cites President James Monroe’s *FOURTH MESSAGE TO CONGRESS*, delivered in 1820; Monroe wrote, “a government which is founded by, administered for, and is supported by the people.” *Id.* at 363-64.

<sup>27</sup>*See, e.g.*, DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 149-52, 173-75 (2005) (discussing Lincoln’s reputation on the circuit and in large patent case).

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As Lincoln drew near the end of the Second Inaugural, his prose had the timbre and reverberation we associate with great poetry. We may speak of Lincoln’s finest prose as a kind of poetry. The meter in Lincoln’s words was never as consistent as it is in most poetry. It varied from regular to irregular. His language and style became more metrical as his words became more emotional.

Lincoln’s writing resembled poetry in part because he was writing for the ear.

“people,” “of,” “by,” and “for” are oracular, delphic, shining with light and hope, yet tantalizingly vague, with meaning sometimes obscured, much like the chameleon phrases “due process,” “cruel and unusual punishment,” and “rule of law”<sup>30</sup> that continue to inspire, intrigue and puzzle us.

In a sense, Lincoln restated for our courts and judges the equivalent of the Golden Rule. They reflect our aspirational goals as well as the mundane work-rules of our courts—desiderata I emphasize to my new clerks each year: we are here to help litigants, lawyers and the public; persons before us in any criminal and civil matter must be treated with respect; their dignity must be preserved; we exist to serve the people to whom we owe allegiance and assistance in preserving *their* government and *their* control of it for *their* benefit.

Whether the guidance of Lincoln, with its evocation of Jefferson’s better self, can overcome what Justice Brandeis referred to as the current “curse of bigness,”<sup>31</sup> with its

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RONALD C. WHITE, JR., LINCOLN’S GREATEST SPEECH: THE SECOND INAUGURAL 156 (2002).

<sup>29</sup>GABOR BORITT, THE GETTYSBURG GOSPEL, 122 (2006) (“In the Bible, Lincoln had read many a time in the Book of Proverbs: ‘Where *there is* no vision, the people perish.’ He was providing a vision ‘for us, the living,’ not the dead.”) (emphasis in original); *see also* 1 Jeremiah 17 (“[S]peak unto them all . . . be not dismayed at their faces. . .”).

<sup>30</sup>*See* Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2132 (2007) (reviewing Brian Z. Tamanaha, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006)) (noting that it is possible, but unlikely, that “various strands of legal realism will in the long run fatally undermine or corrode the internalized sense of legal rule-following by officials and the public that is part of what we call the rule of law.”) (footnote omitted); Jack B. Weinstein, *Religion and Sentencing in the United States*, 23 TOURO L. REV. 53 (forthcoming 2007) (internalized enforcement of law in religion and secular life).

<sup>31</sup>*See* LOUIS D. BRANDEIS, THE WORDS OF JUSTICE BRANDEIS, *reprinted in* FAMILIAR QUOTATIONS 833a (John Bartlett ed., 14th ed. 1968) (“There is in most Americans some spark of idealism which can be fanned into a flame . . . the results are often extraordinary.”).

concomitant arrogance of office and position, remains open to question. Some of the points where the issue arises are touched upon below.

### History to Gettysburg

Without denigrating the work of leaders like Madison,<sup>32</sup> the preeminent Founders for me are Washington, Hamilton and Jefferson—Washington, for character; Hamilton, for rational economics;<sup>33</sup> and Jefferson,<sup>34</sup> for defining the central aspiration of our society, equal rights for all.<sup>35</sup> The great monuments in the nation’s capitol to Jefferson and Lincoln, rather than to Hamilton, suggest that it is Jefferson in the Declaration of Independence who epitomizes our nation’s deepest yearnings and who inspired Lincoln.

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<sup>32</sup>*See generally* RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* (1990); RICHARD LABINSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* (2006); *THE FOUNDING FATHERS: JAMES MADISON, A BIOGRAPHY IN HIS OWN WORDS* (Merrill D. Peterson, ed., 1974).

<sup>33</sup>*THE LAW PRACTICE OF ALEXANDER HAMILTON* (Julius Goebel, Jr., ed., 1964 & 1969); RON CHERNOW, *ALEXANDER HAMILTON 344-45* (2004); *see* Symposium, *On Capitalism and Democracy*, 5 *DAEDALUS*, Summer 2007.

Benjamin Franklin, entrepreneur, scientist and communitarian, is probably best placed in the Hamilton camp. *See generally* WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* (2003). Franklin represents that great American ever-changing synthesis among successful private capitalism (he made a fortune quickly), government and private philanthropic concern for the public’s welfare (his municipal fire department, library and other public enterprises are well known), and emphasis on learning and technology as a base for the economy (his writings, eyeglasses, stove, and experiments with electricity were celebrated in France and provided a base of respect that led to vital loans to the new republic). *See, e.g., id.*; WALTER ISAACSON, *BENJAMIN FRANKLIN READER* (2003).

<sup>34</sup>Susan Dunn, *Introduction* to *SOMETHING THAT WILL SURPRISE THE WORLD: THE ESSENTIAL WRITINGS OF THE FOUNDING FATHERS 7-8* (Susan Dunn ed., 2006) (discussing radical theory of Jefferson, practical stable sense of Hamilton and “the middle ground between theory and experience” of Washington) (emphasis omitted).

<sup>35</sup>JEFFREY B. MORRIS & RICHARD B. MORRIS, *ENCYCLOPEDIA OF AMERICAN HISTORY* 1056 (7th ed. 1996).

Sean Wilentz summed up Lincoln's bias towards Jefferson this way:

As he transformed himself from a Henry Clay Whig to a Republican to a national leader, Lincoln found himself pulled more than ever to the ideas and the figure of Thomas Jefferson. "All honor to Jefferson," he wrote in 1859, who in the midst of the War of Independence had had the "coolness, forecast, and capacity" to introduce the great truth of equality, "applicable to all men and all times," that would forever stand as "a rebuke and a stumbling block to . . . re-appearing tyranny and oppression." For all of his inconsistencies and hypocrisies, Jefferson had not only pronounced what Lincoln called "the definitions and axioms of free society," but, in the 1790's and after, had put them into practice, winning over, encouraging, and giving a measure of real political influence to the city and country democracies that had emerged out of the American Revolution.<sup>36</sup>

Certainly, for Lincoln it was Jefferson's Declaration of Independence that was the nation's foundation document.<sup>37</sup> As Harry Jaffa put it:

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<sup>36</sup>SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 790 (2005). Jacksonian developments were critical in Lincoln's maturing views.

Organized as a movement of reform to eliminate a perceived recrudescence of privilege, the Jacksonians combined the evolving city and country democracies into a national political force. They also created a new kind of political party, more egalitarian in its institutions and its ideals than any that had preceded it, unabashed in its disciplined pursuit of power, dedicated to securing the sovereignty that, as its chief architect Martin Van Buren observed, "belongs inalienably to the people."

*Id.* at 791. Lincoln made frequent references to Jefferson in his writings. ABRAHAM LINCOLN, *HIS SPEECHES AND WRITINGS* 833 (Roy P. Basler ed., 2d ed. 2001).

<sup>37</sup>The Gettysburg Address both evoked the principles underlying the Declaration of Independence and re-imagined them to address the contemporary context—not freedom from colonial rule, but individual liberty and equality for a greater class of persons. Harry V. Jaffa, *Abraham Lincoln and the Universal Meaning of the Declaration of Independence*, in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 37 (Scott Douglass Gerber ed., 2002). George P. Fletcher argues that the Gettysburg Address serves as the "preamble to the [new] constitutional order . . . of nationhood, equality, and democracy . . . ." GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 33 (2001). Lincoln considered the Declaration of Independence, not the Constitution, his strongest influence, stating that "I never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence." *Id.* at 36. In his critique of the Supreme Court's *Dred Scott v.*

The Gettysburg Address is the consummate epitome of a quarter-century of Lincoln's thought and expression. In the same 1859 letter in which Lincoln called the great proposition of human equality "an abstract truth, applicable to all men and all times," he also declared that the "principles of Jefferson are the definitions and axioms of free society." Lincoln, like the generation of the Founding, believed that those principles were grounded in reason and nature.<sup>38</sup>

The Founders were well aware of historical underpinnings of the inclusive meaning of the concept "people" in a democracy.<sup>39</sup>

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*Sandford* decision, 60 U.S. 393 (1856), Lincoln emphasized the inclusive language of the Declaration of Independence. He railed against the Supreme Court, noting that Chief Justice Taney "admit[ted] that the language of the Declaration is broad enough to include the whole human family," and that the founding fathers "meant to set up a standard maxim for a free society." Harry V. Jaffa, *Abraham Lincoln and the Universal Meaning of the Declaration of Independence*, in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 34 (Scott Douglass Gerber ed., 2002).

<sup>38</sup>HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* 80 (2000). Note also reliance on "Jefferson's lead in excluding slavery from the territories of the Old Northwest . . . [and] within the northern portions of the Louisiana Purchase." RICHARD CARWARDINE, *LINCOLN: A LIFE OF PURPOSE AND POWER* 29 (2006).

<sup>39</sup>James McPherson, *The Art of Abraham Lincoln*, N.Y. REV. OF BOOKS, July 16, 1992. Pericles, the progenitor, sought to invoke Athenian pride across class and social divisions. Minimizing class distinctions, he charged all citizens, irrespective of wealth and status, to serve the city-state. 2 THUCYDIDES, *PLUTARCH'S CIMON AND PERICLES* 165, 170-7 (Bernadotte Perrin, ed. & trans., Charles Scribner's Sons 1910) (431 B.C.E.). James Madison read Thucydides in his native tongue. ROBERT KETCHAM, *JAMES MADISON, A BIOGRAPHY* 45-46 (1st paper. ed. 1990).

John Locke powerfully argued against the Crown's discriminatory treatment of its subjects. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 26 (James H. Tully ed., Hackett Publishing Co. 1983) (1689).

In the eighteenth century, Sir William Blackstone wrote extensively on both the nature and the application of legal rights and expanded upon Locke's principles of fair and just governance. He argued that a person subject to British law retained inalienable rights irrespective of race or religion and rejected limiting rights based on whether a person was a "slave . . . negro . . . jew, a turk or a heathen." The full quotation reads:

And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty, and his property. . . . The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a jew, a turk, or a

## Effect Since Gettysburg

The American system can be divided into three almost equal discrete time periods. During the years that Lincoln referred to as “four score and seven” from inception to Gettysburg, our political and economic systems were being established, with slavery an increasing issue of conflict between aspiration and reality.

In the post-Civil War period, there was the enormous expansion of the economy. The Supreme Court generally restricted freedom in fact to the former slaves by largely gutting the Fourteenth Amendment<sup>40</sup> and, by striking down child labor and other protective laws, preventing

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heathen, as well as to those who profess the true religion of Christ . . . . [T]he slave is entitled to the same liberty in England before, as after, baptism; and, whatever service the heathen negro owed to his English master, the same is he bound to render when a christian.

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: OF THE RIGHTS OF PERSONS \*412-13; *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541-42 (2005). Lincoln’s legal education included studying Blackstone’s *Commentaries*. Lincoln wrote that Blackstone’s *Commentaries* were essential reading to “[obtain] a thorough knowledge of the law.” John J. Duff, A LINCOLN: PRAIRIE LAWYER 8, 15-17 (Rinehart & Co., Inc. 1960).

Thomas Paine, an ideological contemporary of the drafters of the Declaration of Independence, championed the same principles as Locke and Blackstone in his campaign for universal male suffrage. Paine challenged the aristocratic tradition of British parliamentary politics by demanding that the people’s participation in government should not be restricted based on inheritance, class or wealth. THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT, *reprinted in* RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS 401 (Mark Philip ed., Oxford Univ. Press 1995) (1795). Paine himself was prosecuted for sedition and libel in a political show trial. His defense argued that Paine, and other British reformers, constituted the ideological heirs of Locke and others. His defense attorney, Thomas Erskine, quoted at length “from John Milton, John Locke and David Hume” to argue that Paine and his contemporaries were “part of a long and respectable British tradition of political enquiry.” John Barrell & Jon Mee, *Introduction to* 1 TRIALS FOR TREASON AND SEDITION: 1792-1794 xviii (John Barrell & Jon Mee eds., Pickering & Chatto 2006).

<sup>40</sup>*See* Civil Rights Cases, 109 U.S. 3, 24-26 (1883); KATHLEEN M. SULLIVAN & GERALD

the protection of more vulnerable people by legislatures.<sup>41</sup>

The third period began just before World War II. At first, there was an extraordinary blooming of the constitutional and statutory rights of the people. Now, we are currently experiencing a falling back from that advance in civil and human rights.

At times our courts have swung widely off course as with *Dred Scott*, in the 1850s<sup>42</sup> excluding Blacks from citizenship; the post-war *Civil Rights Cases*<sup>43</sup> that narrowed the Fourteenth Amendment's promise of equality and due process for all to almost nothing; the 1896 *Plessy v. Ferguson* opinion, which relegated Blacks to a separate and unequal status;<sup>44</sup> and cases striking down protection of workers before the New Deal.<sup>45</sup>

We steadied on course in the middle of the twentieth century, particularly with *Brown*. I am struck by how optimistic we were in the post-World War II years, when the American Civil Liberties Union saw published in 1971 in honor of its Fiftieth Anniversary a book edited by Professor Norman Dorsen, with over thirty leaders describing greatly broadened rights of the people—from non-citizens to voters.<sup>46</sup>

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GUNTHER, CONSTITUTIONAL LAW 680-83 (16th ed. 2007).

<sup>41</sup>*See. e.g.,* *Lochner v. New York*, 198 U.S. 45, 56-57 (1905).

<sup>42</sup>*Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>43</sup>109 U.S. 3, 24-26 (1883).

<sup>44</sup>163 U.S. 537, 551-52 (1896).

<sup>45</sup>KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 371-75 (16th ed. 2007).

<sup>46</sup>THE RIGHTS OF AMERICANS, WHAT THEY ARE—WHAT THEY SHOULD BE (Norman Dorsen ed., 1971): *The Right to Equal Educational Opportunity* - Robert L. Carter, *to Equal*

Beginning towards the end of the twentieth century our courts again began to ignore Lincoln's prophecy. My critical views of this development do not imply any lack of respect for the technical skills of present judges. But, despite our legal scholarship, are we losing sight of what Lincoln defined—the duty of our courts towards the people of this great country and their democratic government?<sup>47</sup>

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*Employment Opportunity* - Michael I. Sovern, *to Housing* - Frank I. Michelman, *to Welfare* - Edward V. Sparer, *to Special Treatment* - Graham Hughes, *to Legal Services* - Jerome J. Shestack, *of Consumers* - Philip G. Schrag, *to a Habitable Environment* - Eva H. Hanks & John L. Hanks, *to Vote* - James C. Kirby, Jr., *to Participate* - Howard I. Kalodner, *to Protest* - Thomas I. Emerson, *of Association* - Nathaniel L. Nathanson, *to Publish* - Harry Kalven, Jr., *of Access to Mass Media* - John de J. Pemberton, Jr., *of Privacy* - Kent Greenawalt, *to Religious Liberty* - Leo Pfeffer, *to Control the Use of One's Body* - Charles Lister, *to Use Alcohol and Drugs* - Peter Barton Hutt, *to Travel* - Leonard B. Boudin, *The Rights of Suspects* - Anthony G. Amsterdam, *Criminal Defendants* - Daniel A. Reznick, *Prisoners* - Philip J. Hirschkop, *Juveniles* - Daniel A. Reznick, *Mental Patients* - Bruce J. Ennis, *Selective Service Registrants* - Michael E. Tigar, *Women* - Pauli Murray, *Teachers and Professors* - William W. Van Alstyne, *Students* - Roy Lucas, *Unions and Union Members* - Clyde W. Summers, *Servicemen* - Edward F. Sherman, *Aliens* - Edward J. Ennis.

<sup>47</sup>See Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 *FORDHAM URB. L.J.* 131 (2004) (discussing the obligation of the judge to speak out against injustice); Symposium, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers Under the Third Reich and Vichy, France*, 61 *BROOK. L. REV.* 1121, 1128, 1154-58 (1995); cf. Fred Kaplan, *Challenging the Generals*, *N.Y. TIMES MAG.*, Aug. 26, 2007, at 33 (reporting on junior officers' complaints that generals did not speak up about inappropriate tactics in Iraq).

## V. Appropriate Modesty Without Abnegation

In considering the roles of judges, the constitutional powers of Congress and the President must be given weight when construing the Constitution. It is appropriate to concede that the judges' function in defining the law is a relatively minor one compared to that of the legislature and executive. Humility is called for. The court's powers to modify rules of substance or even of procedure<sup>48</sup> are relatively slight, usually through small steps in individual cases. As Cardozo instructed us, judge-made changes primarily consist of filling in interstitial areas of the law.<sup>49</sup> Nevertheless, the speed and direction in which a judge tries to move the law will be substantially affected by the judge's view of our country's ideals, as well as by his or her own experience and philosophy.

Cardozo recognized that "the choice [of rule] that will approve itself to [the] judge . . . will be determined largely by his conception of the end of the law."<sup>50</sup> He was pragmatic, conforming the law where possible to what he saw as the people's needs.<sup>51</sup> In Judge Posner's

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<sup>48</sup>JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977).

<sup>49</sup>ANDREW L. KAUFMAN, CARDOZO 213, 250 (1998). Kaufman traces the thought to Holmes without attribution by Cardozo. *Id.* at 638, n.58. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-14 (1921) (a judge "legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out . . ."); *see also* Michael Marks Cohen, *Saying "Excelsior" to Stanley H. Fuld*, 104 COLUM. L. REV. 265, 265 (2004) ("Stanley Fuld was a good jumper. . . . He was not afraid to make large leaps. But what enabled him to maximize his talent was, I believe, an understanding that the smaller the jump was, the more likely the result would be persuasive and sound.").

<sup>50</sup>RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 53 (1990).

<sup>51</sup>*Id.* at 93; ANDREW L. KAUFMAN, CARDOZO 135 (1998) ("Focus on the facts, adaptation of doctrine to social conditions, emphasis on reason and a sense of justice, respect for the role of the legislature in lawmaking . . . were all notable elements.").

phrase, “Cardozo’s project [was] making the law serve human rather than mandarin needs.”<sup>52</sup>

“[H]is judicial program [was] bringing law closer to the (informed) non-lawyer’s sense of justice . . . , recognizing both the inherent and the contingent shortcomings of the legislative process.”<sup>53</sup>

Like the “best judges,” he “wanted to change the law[s].”<sup>54</sup>

Making policy by exercising the power of construing the Constitution—rather than by interpreting amendable statutes—can be dangerous and contrary to our assumption that the people are the ultimate arbiters of our democracy.<sup>55</sup> Constitutionally based decisions can tie the hands of our democratically selected legislatures, which are constrained to follow the Court’s interpretation of fundamental law. As one of his biographers summarized Cardozo’s views on the matter:

Judicial restraint, Cardozo believed, was a way of recognizing the provisional, contingent nature of policymaking. Judges must accept a new statutory formulation if it “is one that an enlightened legislature might act upon without affront to justice.” Whenever the issue was one on which “men of reason may reasonably differ,” he said, “the legislature must have its way.”<sup>56</sup>

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<sup>52</sup>RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 107 (1990).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*See* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (stressing popular rather than court control over constitutional interpretation).

<sup>56</sup> RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 196-96 (1997) (quoting *Barnett v. Wells*, 289 U.S. 670, 679 (1933) and *Williams v. Baltimore*, 288 U.S. 36, 101 (1933)). In January 1935 when the Supreme Court declared invalid the first New Deal measure it considered, Cardozo was the sole dissenter. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 438-48 (1935). He did, however, vote with a unanimous court to strike down the National Industrial Recovery Act. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551-53 (1935).

The difference between the effect of legislative and constitutional interpretation was illustrated recently by a five-to-four decision limiting, by statutory interpretation of the statute of limitations, workers' rights to compensation for gender discrimination.<sup>57</sup> Congress can overrule the decision by clarifying legislation. Cardozo's position in recommending the establishment of the New York Law Revision Commission<sup>58</sup> and in helping establish the American Law Institute<sup>59</sup> reflected his understanding that when the courts' small steps in adapting the law were not enough—or were in the wrong direction—legislation and basic reform were required.

Because of *stare decisis*, constitutional precedents are understood to be less amenable to change even by the Court, and, in the short run, the Court's rulings are immune from legislative modification.<sup>60</sup> To some it may seem strange that some members of the present Court tend to ignore the stabilizing weight of precedent when recent decisions interfere with conservative programmatic agendas.

As Justice William O. Douglas put it in his Cardozo Lecture on *Stare Decisis*:

This search for a static security—in the law or elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable. A position that can be shifted to meet such forces and at least partly absorb them alone gives hope to security. I speak here of long-term swings in the law. I do not suggest

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<sup>57</sup>Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007).

<sup>58</sup>ANDREW L. KAUFMAN, CARDOZO 630 n.50 (1998).

<sup>59</sup>*Id.* at 160, 173-175, 287, 473.

<sup>60</sup>*See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, 164 (1982); *see also* Michael J. Perry's forthcoming book, ch. 2 (2007).

that *stare decisis* is so fragile a thing as to bow before every wind.<sup>61</sup>

Controversies about how the courts should exercise their powers in interpreting the Constitution are not new.<sup>62</sup> Jefferson's battle with Marshall over the limits on the Court's power still reverberates.<sup>63</sup> *Marbury v. Madison*'s assumption of the right to declare legislation unconstitutional has been described with some justification as "a political coup of the first magnitude."<sup>64</sup>

Experience's Effect on Justice: Fact, Law and Empathy<sup>65</sup>

For trial and intermediate appellate judges constitutional questions are rare. Their

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<sup>61</sup>William O. Douglas, Assoc. Justice, U.S. Supreme Court, *Stare Decisis*, The Benjamin Cardozo Memorial Lecture (1949), in 1 THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BENJAMIN N. CARDOZO MEMORIAL LECTURES 267 (1995).

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As a legal system grows, the remedies that it affords substantially proliferate, a development to which the courts contribute but in which the legislature has an even larger hand. There has been major growth of this kind in our system and I dare say there will be more, increasing correspondingly the number and variety of the occasions when a constitutional adjudication may be sought and must be made. Am I not right, however, in believing that the underlying theory of the courts' participation has not changed and that, indeed, the very multiplicity of remedies and grievances makes it increasingly important that the theory and its implications be maintained?

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959) (footnotes omitted).

<sup>63</sup>See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005) ("[A] decade of grim institutional struggle between the men of 1800 and the men of 1787—between the president, whose mandate from the People was backed by Congress, and the Court, whose mandate was backed by a piece of paper. At the end of our story, neither side would gain total victory.").

<sup>64</sup>*Id.* at 222.

<sup>65</sup>Jack B. Weinstein, *Three Gates to Justice*, 26 LITIG., Winter 2000, at 3.

decisions deal mainly with the details of more mundane issues. There are three elements of a just decision: facts, law and empathy.<sup>66</sup>

### Facts

Determination of the facts is seldom easy. The jury's constitutionally based fact-finding primacy demands a measure of forbearance on the part of judges. We cannot forget that, because of our narrow life experiences, our ability to draw appropriate inferences from the evidence in the cases before us is limited. Whenever it is arguably appropriate, we should allow the matter to go to the jury, reserving the right to set aside its decision if there proves to be no rational basis for the verdict. Not only is this the fairest approach in most cases, but it also provides litigants with something most desire—a chance to be heard and a judgment by their fairly selected peers.

Increasingly complex science, technology, and communications issues provide intriguing prospective fact issues. Judges have an obligation to try to understand what is happening in our real world<sup>67</sup> in order to find—and help juries find—the facts. As my first law clerk, Professor Margaret A. Berger, warns us:

The courts' handling of causation issues in toxic tort cases reveals a paradox. On the one hand, since 1993 when the Supreme Court decided *Daubert*, the first of three opinions on the admissibility of expert testimony, toxic tort litigation has seemingly functioned as a subcategory of evidence law. Plaintiffs cannot prove that defendant's pharmaceuticals or chemicals caused their damaged health without

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<sup>66</sup>David C. Wrobel, Book Review of Markus Dirk Dubber, *The Sense of Justice: Empathy in Law and Punishment*, N.Y.L.J. Aug. 10, 2007, at 2.

<sup>67</sup>Jack B. Weinstein, *Learning, Speaking and Acting: What are the Limits for Judges?*, 77 JUDICATURE 322 (1994) (“To make informed and fair decisions, judges must not isolate themselves from society.”); Thomas Adcock, *Ex. Judge Hayes, Her Volunteerism Spurs Others to Help in the Big Easy*, N.Y.L.J. Sept. 14, 2007, at 23 (former Acting Manhattan Supreme Court Justice Leslie Crocker, after doing pro bono work in New Orleans, recommends pro bono work to judges and others).

expert testimony on causation, the crucial issue in these cases. Consequently, the Supreme Court's admissibility test which commands trial judges to exclude expert testimony unless it is relevant and reliable is often outcome determinative. If defendant makes a so-called *Daubert* motion by moving *in limine* to exclude plaintiff's causation experts, and the trial judge agrees that the proposed testimony does not satisfy *Daubert*, the judge will exclude the experts and grant summary judgment. Since *Daubert*, that has been the result in numerous toxic tort cases both in federal and state court.

But if we look beneath the rhetoric. . . . *Daubert* affects pretrial practices like discovery and summary judgment far more than trial, the supposed domain of rules of evidence. In the name of *Daubert* and Evidence, judges who so choose have a *powerful tool with which to manipulate the American system of adjudication and bypass the Seventh Amendment*. Ironically, in toxic tort cases this means that courts not infrequently trample the evidentiary objective Justice Blackmun sought in *Daubert*—determinations on causation that are consistent with good science. [There are] two judicial approaches to *Daubert* motions that highlight the non-evidentiary consequences of *Daubert* and its inconsistency with scientific objectives. One, judges conflate admissibility with sufficiency standards, and two, judges ignore defense behavior that prevents plaintiff from acquiring data needed to prove causation.<sup>68</sup>

## Law

Law is the favored domain of judges, but haze often obscures the terrain. Protection of rights has generally improved in the more than sixty years that I have been studying law.

Women, minorities, the disabled, homosexuals, those abused by the police, and those injured by negligently manufactured and marketed chemicals and products find the courts today available in many instances. A powerful—some would say too powerful—bar now serves both defendants and plaintiffs. The problems are strikingly illustrated in the area of tort law—a subject I will touch on below.

In the main, since World War II we have persisted in trying to create substantive and procedural rules available equally to all within our country—rich and poor, powerful and

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<sup>68</sup>Margaret A. Berger, *On Daubert* (2007) (forthcoming) (emphasis added).

powerless. But, in Congress, state legislatures, and many courts today there is a shift toward closing the door to substantive and procedural justice. Created are substantive barriers to suits and restrictions on necessary procedural routes to fair adjudications. In the area of torts, our success in making the law available to those harmed by massive delicts is being compromised.

Appellate courts seem increasingly adverse to aggregating cases through class actions and other means. In many instances this has led to frustration on the part of both plaintiffs and defendants, who, together, seek by class-action settlements to avoid large-scale human distress, huge transactional costs, delays, the multiplication of suits across many jurisdictions, and difficulties in planning industrial and commercial activity because of overhanging clouds of litigation.

The justification proposed for restricting the vindication of rights in mass lawsuits is, in large part, that massive litigation is too expensive and too coercive of defendants. My experience suggests that such alleged defects are largely fanciful. Given sensible control by judges of cases and fees, abuses can be minimized. The advantages of leaving the avenue to the courts open to all with grievances heavily outweigh the disadvantages.

We have the tools to provide individual justice in mass litigation. Yet, we must be particularly vigilant of, and sensitive to, the ethical issues of representation and due process—especially when the complaints of many are considered in a single case. I am not critical, for example, of the Third and Fifth Circuits’ refusal—approved by the Supreme Court—to countenance a few of the massive settlements in the asbestos litigation.<sup>69</sup> Those cases raised

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<sup>69</sup>*See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

serous problems of ethics and concerns about adequate representation of future claimants and of subclasses.

The inherent tension between individual justice and mass resolution of complex litigation does present sometimes baffling questions. Judges and lawyers are aware of the pitfalls in fashioning proposed solutions. Ultimately, courts can give ethics and due process their due in handling mass disasters effectively without cutting off effective avenues for remedies by plaintiffs.

I have tried many mass tort cases and have helped settle many thousands more involving Agent Orange, asbestos, DES, breast implants, guns, tobacco, pharmaceuticals, and others. Based on that experience, I conclude that consolidated litigations, class actions, and quasi-class actions do not subvert due process. In fact, as I point out in discussing torts, they can serve the litigants and the nation well.<sup>70</sup>

Perhaps the most difficult intellectual-political problems raised by complex cases relate to our federalism. How can we integrate the work of our federal and state courts when litigations such as asbestos or tobacco spread throughout hundreds of courts and dozens of jurisdictions? Can one state or federal court satisfy the world—by settlement, class action, or other techniques—with respect to varied and widespread claims and defenses? In the main, the answer is “yes.”

In many instances it would be better if the legislature dealt with these matters—as they have in part through providing for Multidistrict Panel transfer of cases to one judge for all

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<sup>70</sup>See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS LITIGATION* (1995).

pretrial purposes. There is merit in Professor Edward Cooper's view that "[s]atisfactory answers to dispersed mass torts are most likely to be found in legislative resolutions that move away both from tort law as we know it and from judicial procedure."<sup>71</sup> Modified bankruptcy procedures could also provide a useful path.

The Class Action Fairness Act of 2005, which permits removal to federal courts of national class actions, was sensible.<sup>72</sup> I have recommended that the Act be expanded to large numbers of individual aggregatable cases, such as those in the pharmaceutical field, that have not been brought as class actions.<sup>73</sup>

When the legislatures do not deal with the problems, it is left to the lawyers and judges to address them, utilizing traditional equitable and common law principles in the light of new circumstances. Our economy operates on a national and international scale. The law of the simple one-on-one automobile fender bender requires modification if it is to accomplish effective justice in global cases arising in today's technological, economic, and social worlds.

There are festering sores left on the public and private psyches by disasters such as tobacco, DES, thalidomide, Agent Orange, asbestos, and HIV-tainted transfusion blood. The law cannot ignore those wounds. It should provide some effective monetary balm. To do so the law must change as society and technology changes.

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<sup>71</sup>Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 946 (1998).

<sup>72</sup>Pub. L. 109-2, § 5(a), 119 Stat. 12 (codified as amended in scattered sections of 28 U.S.C.); *see also* 28 U.S.C. § 1453.

<sup>73</sup>*See e.g., In re Zyprexa Prod.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007); Jack B. Weinstein, Senior Judge, Address at the Meeting of Federal Multidistrict Litigation Judges: Quasi-Class Actions (Oct. 15, 2007).

As Chief Judge Kaye of the New York Court of Appeals, following the insights of her distinguished predecessors Cardozo and Fuld, put it:

Choices among the precedents of another day—which to bring forward, which to leave behind, which to extend to meet some new condition, which to limit or overrule—mark the progress of the law. This process breathes life into our law; it gives relevance and rationality . . . to rules fashioned for another day, so that they command acceptance as principles by which we live.<sup>74</sup>

In his trenchant essay in the *Stanford Law Review*, “The Life of the Law,”<sup>75</sup> Professor John Goldberg reminds us that Cardozo sought to inform his reliance on legal analysis with a sense of the social, political, and economic context within which the law functions.

### Empathy

The final element in resolving legal disputes is vital in enforcing the rule of law, though it is frequently unnoticed, ignored, and even derided as lawyers and judges focus on the first two—fact and law. It is the component of empathy—of humanity, of the human spirit, and of the feelings we have for our fellow men and women. It gives life and meaning to our work as lawyers and judges.<sup>76</sup>

There is hanging in our judges’ conference room in the Eastern District of New York a large copy of the last known picture of Lincoln, taken a few days before his death—haggard, with

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<sup>74</sup>Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1009-10 (1988).

<sup>75</sup>See the extensive book review by John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419 (1999) (reviewing ANDREW L. KAUFMAN, *CARDOZO* (1998)).

<sup>76</sup>I have expanded on this view in a 145-page unpublished manuscript written in March of 1996 as I took senior status, emphasizing the human face of the law. JACK B. WEINSTEIN, INDEPENDENT TRIAL JUDGES IN TOUCH WITH HUMANITY (March 1996) (unpublished) (on file with the author).

sad eyes in deep sockets, reflecting his connection to all humanity and its travails. The photograph is a continuing reminder to each of our judges of his or her bond with all those whose lives depend upon our empathy and sagacity.<sup>77</sup>

Judges often deal with people living “lives of silent desperation,” who look to us for understanding.<sup>78</sup> A judge’s experiences in and out of court—aided by that of jurors—is critical to this vital rapport factor.

Some judges and lawyers seem to ignore this passageway to the heart and spirit of the law. Up in high towers, many look for the bottom financial line or the rigid imposition of technical niceties, ignoring the effect of their work on individuals’ well being. More involvement by all of us in efforts to assist and to know the disadvantaged might help.

As judges, successful and with friends from affluent classes, we are too often out of touch emotionally with the people before us. It might be beneficial to have more appellate judges volunteer to try cases, particularly those involving sentencing. Appellate interpretations of the Sentencing Guidelines might be more compassionate—and perhaps more in the public interest—

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<sup>77</sup>During the Civil War, Lincoln, as Commander-in-Chief, in effect exercised the power of a judge. His compassion was evident:

“I’ve had more questions of life and death to settle in four years than all the other men who ever sat in this chair put together,” said Lincoln to Bromwell of Illinois . . . .  
“No man knows the distress of my mind. Some of them I couldn’t save. There are cases where the law must be executed . . . .” Bromwell noticed Lincoln’s eyes moisten . . . .

CARL SANDBURG, *ABRAHAM LINCOLN: THE WAR YEARS* 132-33 (1939). Towards the end of the war, by proclamation, he pardoned all deserters who “return to their regiments or companies.” *Id.* at 133.

<sup>78</sup>*United States v. Delgado*, 994 F. Supp. 143 (E.D.N.Y. 1998) (quoting HENRY DAVID THOREAU, *WALDEN, OR LIFE IN THE WOODS* 9 (Vintage Books 1991) (1854)).

if appellate jurists had direct experience with the human costs of the rigid and inflexible imposition of, for example, long prison sentences.

Trial judges, the front-line representatives and human face of the law, cannot blink away the baleful effect in our criminal and civil litigations of sharp and growing socioeconomic differences.<sup>79</sup> But even *nisi prius* judges can become hardened by too much exposure to tragedy. And it is difficult to find the time or opportunity to recharge our batteries of compassion by meeting and helping people in our deprived communities.

We punish by the book, by the numbers, by rigid guidelines, by unnecessarily cruel minimum sentences. The result is overfilled prisons and unnecessary havoc and suffering for those within and without incarcerating walls. The emotional and economic costs of indirectly punishing families and communities are too great.

In our mass tort cases, delayed decision and frustration of rights is endemic. Powerful stories of human tragedy have echoed in my court through the years: women damaged by their mothers' ingestion of DES, who are now unable to have children of their own; Vietnam veterans, frightened of the effects of herbicides on their progeny; men struck down by dreaded lung cancers because, when they were still teenagers, they were exposed to asbestos when building the ships with which we won a war; persons suffering from AIDS because of tainted blood used in transfusions; and mothers driven to become drug couriers by cruel traffickers and poverty. To

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<sup>79</sup>See Barbara Bennett Woodhouse, *Race, Culture, Class, and the Myth of Crisis: An Ecogenerist Perspective on Child Welfare*, 81 ST. JOHN'S L. REV. 519 (2007); Sandra T. Azar & Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 519 (2007). But see Andrew Hacker, *They'd Much Rather Be Rich*, N.Y. REV., Oct. 11, 2007, at 31.

see those who live such stories is to understand why the law must be sensitive to human needs.

We must try to bridge the gap between us and those who need us.<sup>80</sup> We must try to open a dialogue between the heart of the law and the hearts of those who seek justice from us.

I had an illustration of the need to communicate the other day. I had denied a habeas petition to a man convicted in state court of a heinous murder. I wrote a long opinion. The Court of Appeals affirmed in an extensive memorandum. There followed the usual flurry of Rule 60(b) and other motions by the prisoner. The last few requested that I order the Court of Appeals to modify its last remand order. In a telephone conference, I explained that he would have to apply to the Court of Appeals for that relief; I could not order a superior court to do anything. The prisoner kept saying, “You don’t understand, you don’t understand.” Finally the interpreter got through to me: “Judge, I keep writing to the Court of Appeals, but they don’t answer my letters.” To the person in a cell, communications, however burdensome and ill advised, are evidence of his humanity, that deserve a response, an answer.<sup>81</sup>

Inside courtrooms and law offices, it is essential that we try to humanize our work. Given our increasingly complex legal system, lawyers and the judiciary run the risk of becoming

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<sup>80</sup>Cf. Louis Uchitelle, *The Richest of the Rich: Proud of the New Gilded Age, Charity and Skills Justify It All, Tycoons Say*, N.Y. TIMES, July 15, 2007, at 1; see also, e.g., Robin Toner, *A New Populism Spurs Democrats on the Economy: Focus on Trade and Jobs in Congress*, N.Y. TIMES, July 16, 2007, at 1 (discussing proposals to address middle class unease); Beth Quinn Barnard, *The Utopia of Sharing*, N.Y. TIMES, Aug. 3, 2007, at F1; Editorial, *The Land of Opportunity*, N.Y. TIMES, July 13, 2007, at A18 (highlighting statistics in greater inequalities of wealth and economic upward mobility in this country compared to other Western democracies); Timothy Miller, Keynote Address at the University of California, Berkeley Symposium: California Communes in Historical Content, (Dec. 11, 2004), <http://www.thefarm.org/museum/californiacommunes.html>; E. GORDON ALDERFER, *THE EPHRATA COMMUNE: AN EARLY AMERICAN COUNTERCULTURE* (1985).

<sup>81</sup>See *Isasi v. Herbert*, No. 01-CV-1804 (E.D.N.Y. Oct. 31, 2007) (docket entry no. 100).

dangerously divorced from the real world of individuals. We ought not permit the distance between ourselves and the public to widen through lack of communication and understanding. This goal requires that we not only act justly on a moral plane, but that we make our reasoning understandable and, as far as practicable, acceptable, with opinions written so that they can be understood not only by lawyers and judges but by lay people.

Leading appellate judges and law professors have described the legal function as performed almost exclusively through bookish research and cogitation. But this description is not complete for trial lawyers and district judges who must observe and deal with real people—people who are sometimes irrational but always unique, interesting and important.

Often, what people need most is a hearing, a forum, a sense that we understand their fears, needs and aspirations.

The third requirement for just administration of the law—that of the spirit, of humanity, of sympathy for the people before us—is the most difficult to satisfy. Because it is invisible and almost never explicitly acknowledged in the law schools or the courts, it is hard to know when we have adequately dealt with it.

Recall the words of Chicago’s poet, Carl Sandburg, in *The People, Yes*. As a secular, First Amendment Judge, I paraphrase:

“Do you solemnly swear that the testimony you are about to give in this case shall be the truth, the whole truth, and nothing but the truth?”

“No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that . . . but the more I study about it the more sure I am that nobody . . . knows. [The whole truth] . . . would burn your insides with the pity and the mystery of it.”<sup>82</sup>

The poet, once lawyer, Archibald MacLeish, put it this way: “The business of the law is to make

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<sup>82</sup>CARL SANDBURG, *THE PEOPLE, YES* 193 (1936).

sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.”<sup>83</sup>

At the opening of this century, enormous demographic, technological and socioeconomic changes are taking place. They will further strain the American resources of fraternity that have carried us through so many crises.

As we weigh each of these three criteria—facts, law and empathy—we strive to accomplish the often near impossible: procedural and substantive fairness and the integration of mercy and justice for the people, for all the people we lawyers and judges are charged with protecting under the Rule of Law.<sup>84</sup>

Much depends upon the sensitivity, background and position of the judge. Judges on higher appellate courts deal primarily in legal abstractions; they are less likely to consider the particular needs of individuals. By contrast, the trial judge—and jury—is in the presence of the individuals the laws affect. They have a stronger sense of how a ruling will influence the lives of the parties, their families and their communities.

Empathy depends in large part on being open to experiences in court as well as outside of it. As a judge I’ve seen disturbed children in a state institution in Suffolk sitting half-naked in their own waste, with no programs to educate them or deal with their problems, while their caretakers watched television;<sup>85</sup> classes of all Black students unnecessarily banished to schools

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<sup>83</sup>Archibald MacLeish, *Apologia*, 85 HARV. L. REV. 1505, 1508 (1972).

<sup>84</sup>*See, e.g., Leviticus 19:18* (“[L]ove thy neighbor as thyself,” from which it is concluded that even a death sentence must be carried out without offense to the defendant’s honor); *see also* Jack B. Weinstein, *Does Religion Have a Role in Criminal Sentencing?*, 23 TOURO L. REV 539, 539 (forthcoming 2007).

<sup>85</sup>*Soc’y for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1310-12

for the emotionally disabled without due process; students placed in segregated grade schools, and pushed out of high schools because their teachers thought them too difficult to deal with<sup>86</sup>—and I’ve walked in the dismal neighborhoods they came from; decent people torn from loving families and their community for long destructive prison terms because of relatively minor economic-need-driven delicts;<sup>87</sup> thousands of young psychotics wrongly denied Social Security disability benefits because the administration had decided, on trumped up evidence, that they could work;<sup>88</sup> mothers, beaten by their men and then deprived by the state of their children—with effectively no lawyers or due process—just because they had been beaten;<sup>89</sup> men languishing in prison awaiting trial because the state’s administrative control of its courts once was abysmal;

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(E.D.N.Y. 1983).

<sup>86</sup>*Lora v. Bd. of Educ. of City of N.Y.*, 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978) (holding that transfer of students amounted to a violation of due process rights); *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 706-09 (E.D.N.Y. 1974) (finding unconstitutional segregation and appointing a special master to negotiate a plan for desegregating the school district at issue); *Knight v. Bd. of Educ. of City of N.Y.*, 48 F.R.D. 108, 112 (E.D.N.Y. 1969) (finding mass expulsion of students from New York City school without a hearing may in several cases violate students’ right to due process); *see also, e.g., Bd. of Educ. of City of N.Y. v. California*, 464 F. Supp. 1114, 1127 (E.D.N.Y. 1979) (finding that ongoing discrimination against teachers and those effects are factors to be considered where schools have previously been ineligible for federal funding); *Caulfield v. Bd. of Ed. of City of N.Y.*, 486 F. Supp. 862, 882 (E.D.N.Y. 1979) (“Discrimination by race in the hiring and assignment of teachers or supervisors, as a matter of law and of fact, constitutes discrimination against students.”).

<sup>87</sup>Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 178-80 (1996).

<sup>88</sup>Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 918-23 (1984).

<sup>89</sup>*Nicholson v. Williams*, 205 F.R.D. 92, 94 (E.D.N.Y. 2001). *But cf.* Radha Syengar, Op-Ed, *The Protection Battered Spouses Don’t Need*, N.Y. TIMES, Aug. 7, 2007, at A23 (arguing that automatic arrest statutes lead to non-reporting).

ex-soldiers with festering wounds;<sup>90</sup> young women rendered barren because their mother had taken a prescribed drug while they were pregnant;<sup>91</sup> and many other injustices. Should I have ignored what my own eyes had seen? I think not.

Most distressing of all, we observe what Marian Wright Edelman and others refer to as “the feeder systems into the Cradle to Prison Pipeline”—the dysfunctional families, the segregated housing communities, inadequate foster care, poor schools, lack of jobs, inadequate family courts, drug dependencies, mental problems, cruel imprisonments, exclusion from voting, repeated crime, and early death.<sup>92</sup> Peer pressures to fail from within the deprived, segregated

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<sup>90</sup>*In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983).

<sup>91</sup>*See In re* DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992).

<sup>92</sup>*See* Marian Wright Edelman, Keynote Address, Brooklyn Law School Symposium, Disproportionate Minority Youth Contact, *in* 15 J.L. & POL’Y 919, 920 (2007); *see also* Judith S. Kaye, *id.* 905, 915, Cheryl Chamber, *id.* 907, 913, Gayle Roberts, *id.* 911, Jean Kastner, *id.* 941; *see also, e.g.*, Kathleen Lucaderno, *City Foster Kid Abuse Leaps 57%: ACS: Spike Due to More Children Being Put in Care After ‘06 Nixzmary Murder*, N.Y. DAILY NEWS, Aug. 19, 2007, at 22; MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN 72-73 (2006) (noting steady increase in child abuse and neglect and juvenile delinquency and violent crime). Michael A. Corriero makes the point:

The overwhelming majority of children prosecuted as juvenile offenders in the Youth part are African-American and Hispanic teenagers, predominantly male, although the proportion of females has risen. Generally, they are born into single-parent homes, most of them headed by young women; they live in the poorest urban neighborhoods. These children often describe a childhood characterized by trauma, separation, and loss; the lack of one consistent caretaker or positive role model; a neighborhood that is impoverished; a family of relatives who have been arrested and incarcerated, and others who suffer mental illness. The children I see often have been physically and emotionally abused, living lives punctuated by neglect and indifference. When they get sick, they go to a crowded hospital emergency room for basic care where they are simply one of many poor, sick people. When they go to school, they are just one of many children jammed into overcrowded, ill-equipped classrooms.

*Id.* at 73.

community are especially hard to overcome.<sup>93</sup> These are the cases we see repeatedly when we sentence.

A judge's experience outside of court also necessarily affects the judge's views. I came from a working class family. I saw destitute men lying in the streets during the Depression, and worked on the docks and the freight yards where I observed gross abuse of workers, particularly minorities. I went into law, I suppose, partly to create a better world for such people. I served during World War II in an unjustly segregated navy. Relatives were killed in the Holocaust. And I labored under Justice Marshall, Judge Fuld and others in the search for equality under law for all people. Based on those experiences in and out of court, I recognize—and accept—the duty of the law and its lawyers and judges to help the disadvantaged where the law, reasonably construed, allows such support.

Trial judges who have a metaphorical window on the world at street level rather than from an upper floor have an opportunity to gain a better sense of real people's daily needs, reactions and expectations. But, necessarily even the most abstract appellate legal decisions will be informed by the judges' personal experiences. In an article on Family Leave, one observer wrote of Chief Justice Rehnquist:

A state social worker . . . filed a lawsuit under the [Family Leave Act] when his wife suffered a near-fatal car accident and he was ordered back to work after his employer said he had exhausted the leave the state offered . . . . The Supreme Court . . . affirmed [the] right to recover damages. It was a stunning ruling, both because the court had upheld states' immunity from federal lawsuits in a string of prior cases and because, in his majority opinion, Chief Justice William Rehnquist underscored the importance of transforming workplace stereotypes. "The fault line between work and family," he declared, is "precisely where sex-based over generalization has been and

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<sup>93</sup>Elissa Gootman, *Survey Reveals Student Attitudes, Parental Goals and Teacher Mistrust*, N.Y. TIMES, Sept. 7, 2004 ("[S]tudents who get good grades are not respected").

remains strongest. . . .”<sup>94</sup>

He saw the issue through the prism of family values—and, perhaps, his own personal experience. At one point in his career, Rehnquist had to care for his own wife. . . . [H]is daughter, Janet, was a single mother who had a demanding job. . . . Several times during the term the. . . case was argued Rehnquist left the chambers early to fetch his granddaughter from school.<sup>95</sup>

Cardozo gave evidence that as a judge he too was not immune from life’s events. His biographer provides an example where he “drew on his own experience as an automobile passenger” to limit a line of Supreme Court cases protecting railroads from liability for crossings accidents.<sup>96</sup> The Justice wrote, “[t]o get out of a vehicle [at a railroad crossing] and reconnoiter is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous . . . .”<sup>97</sup> In another case, at issue was a posted notice that passengers should not move to a vestibule of a train before it came to a full stop. Cardozo construed the notice to allow a passenger to do just that, to rise and move, ready to leave as the train entered the station for fear of being left behind, based on his knowledge as a regular user of railroads.<sup>98</sup> But he was less apt to protect window washers denied safety belts

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<sup>94</sup>Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 723 (2003); Family and Medical Leave Act, 29 U.S.C. §§ 2601-54.

<sup>95</sup>Eyal Press, *Family Leave Values*, N.Y. TIMES MAG., July 29, 2007, at 37; see also Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42 (suggesting that foreign trips as a child and adult relate to citing of foreign and international law).

<sup>96</sup>*Pokora v. Wabash Ry. Co.*, 292 U.S. 98,102-03 (1934); ANDREW L. KAUFMAN, *CARDOZO* 263 (1998).

<sup>97</sup>*Pokora*, 292 U.S. at 104.

<sup>98</sup>ANDREW L. KAUFMAN, *CARDOZO* 259 (1998) (“[H]e was willing to protect train passengers like himself who were in a hurry to leave the train . . .”).

because he never had such a job.<sup>99</sup>

Justice Stevens, one writer strongly suggests, was influenced in his decisions by the unjust conviction of his father.<sup>100</sup> Other experiences in war, practice and as a Supreme Court law clerk apparently also affected his rulings.<sup>101</sup> The well-known effect of the Civil War on Holmes is illustrative of the fact that Supreme Court Justices do not go directly from the womb to Washington's high court.

While personal view and experience cannot be put aside, except when they are unworthy, each judge will be guided primarily by the ideals of our society, dedicated to protection of all of the people and their freedoms and equality, and to the elimination of both invidious and unnecessary discrimination.

In some ways the trial judge—particularly a federal judge with life tenure—can be more independent than appellate judges. He knows that if he cannot convince the higher courts, he can be overruled, thus preventing damage to the system. He need not modify his opinions to garner the votes of others on the panel. In a sense he is, by analogy to what Justice Brandeis described as the laboratories of the states, in a position to experiment, to push the envelope of the law in the direction of what he conceives to be justice.

One amusing example of this independence: When I first came on the bench I found myself sentencing young female drug carriers from Colombia who apparently were not aware of

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<sup>99</sup>*Id.*

<sup>100</sup>Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50, 54.

<sup>101</sup>*See id.* at 55 (detailing Justice Stevens' experience during the World War II and how it affected his view of the death penalty). His experience as a law clerk reviewing liberty and security problems, punishment of General Yamashita, and fighting corruption in Illinois also had an impact. *Id.*

the serious consequences of their acts. So I asked the United States Attorney to suggest that the airlines carrying many of these couriers put up warnings at Colombian airports. The suggestion was ignored until I ordered the most egregious carrier to show cause why its planes should not be seized as deodands under the old English practice forfeiting instruments of crime to the King. The notices were quickly posted.

Just recently the government prosecuted a Chinese-speaking businessman in my court for not declaring more than \$10,000 he was carrying out of the country, as part of a legitimate business deal, on a plane to Hong Kong. It became clear that he had not known the law and had been confused on being accosted on the jetway a few moments before take-off by an English-speaking customs agent who gave him English forms to fill out. The jury quickly acquitted. When I asked them to indicate their reasons, they suggested better and earlier public and individual warnings to those on outgoing flights.<sup>102</sup> The prosecutor was requested to bring their comments to the attention of Homeland Security. If prosecutions of this kind are to go forward, these suggestions should not be ignored.

#### Interpreting the Constitution Flexibly to Help the Disadvantaged

We must recognize, of course, that some people are less able than others. There is an inherent anomaly in attempting to protect both equality and freedom: economic freedom leads almost invariably in a society such as our to greater inequalities. But, need our courts support

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<sup>102</sup>United States v. Lam, No. 07-CR-00342 (E.D.N.Y. 2007) (trial tr. at 404) (noting suggestions of jurors to improve notice after finding defendant not guilty); Anthony M. DeStefano, *Jury Clears Man in Smuggling Case, Slams Gov't*, NEWSDAY, Aug. 24, 2007, at A6; *see also* United States v. Khan, 325 F. Supp. 2d 218, 232-33 (E.D.N.Y. 2004) (exercising the discretion of the court to impose no jail term for taking more than \$10,000 in cash on airplane leaving United States, in part because of lack of notice).

inequalities as great as those now extant in our increasingly rigid class society?<sup>103</sup> How to moderate inequality while encouraging freedom of expression and enterprise remains a pervasive issue in our democracy; the appropriate balance fluctuates with changing social views and technology.

It is appropriate for a judge to ask, “Does my decision unnecessarily widen the gap between rich and poor, advantaged and disadvantaged?” To ask this question is not to deny that much more important than federal judges in dealing with poverty and other social problems are the states’ family, juvenile, landlord-tenant and criminal courts. They need greater support than they now get.<sup>104</sup>

One of my former clerks, Professor Michael Perry, in a chapter entitled “Judicial Protection of ‘Marginal’ Persons”<sup>105</sup> described the role of the judge this way:

We must not minimize the judiciary’s role in focusing our collective attention on the worst features of the desperate plight of our society’s most marginal persons, prisoners and the institutionalized mentally disabled. The importance of that role is perhaps diminished but certainly not belied by the fact that, occasionally, a court might lack the capacity to compel the other branches of government to respond to that plight immediately and in a manner the court deems fully acceptable. The judiciary must not forsake its prophetic function simply because its ability to secure compliance is sometimes weak, for that function is virtually indispensable when the

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<sup>103</sup>See, e.g., Sam Roberts, *New York’s Gap Between Rich and Poor is Nation’s Widest, Census Says*, N.Y. TIMES, Aug. 29, 2007, at B3; Abby Goodnough, *Census Shows a Modest Gain in U.S. Income*, N.Y. TIMES, Aug. 29, 2007, at 1 (rise in income due primarily to more family members entering the workforce and working longer hours; number of people without health insurance also increased).

<sup>104</sup>See, e.g., Robin Runge, *Comprehending the Link Between Domestic Violence and Children: An Interview with Mary Beth Buchanan*, JUDGES’ J., Summer 2007, at 4; Sophia H. Hall, *Restorative Justice for Youth at Risk*, JUDGES’ J., Summer 2007, at 18.

<sup>105</sup>MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 148 (Yale Univ. Press 1982).

vital, vulnerable interests of our society's marginal persons are imperiled.<sup>106</sup>

Compassion in the law is necessarily moderated by Americans' hardheaded skepticism and pragmatism about how we should deal with the complexities and cruelties of life. As Louis Menard put it in his *The Metaphysical Club, A Story of Ideas in America*:

The belief that ideas should never become ideologies—either justifying the status quo, or dictating some transcendent imperative for renouncing it—was the essence . . . . In many ways this was a liberating attitude, and it accounts for the popularity Holmes, James, and Dewey . . . enjoyed in their lifetimes, and for the effect they had on a whole generation . . . . They taught a kind of skepticism that helped people cope with life in a heterogeneous society, in which older human bonds of custom and community seemed to have become attenuated, and to have been replaced by more impersonal networks of obligation and authority.<sup>107</sup>

Justice Breyer's nuanced view of the need for flexibility in interpreting the Constitution<sup>108</sup> makes him a "member" of the American Metaphysical Club, allowing for a more pragmatic and effective administration of justice than a stiff and abstract approach. The more rigid approach of Justice Scalia,<sup>109</sup> anchored in "original meaning," tends to provide ideological results which favor the haves.<sup>110</sup> The Breyer view tends to favor the have-nots, who rely on an interpretation of

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<sup>106</sup>*Id.* at 162 (footnote omitted); *see* *Brown v. Kelly*, 244 F.R.D. 222, 243 (S.D.N.Y. 2007) (certifying class action on behalf of beggars over homeless arrests).

<sup>107</sup>LOUIS MENARD, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* xi (2001).

<sup>108</sup>*See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006); KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (2006).

<sup>109</sup>*See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J. dissenting); MARK LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

<sup>110</sup>Professor Michael Perry wrote me to point out that:

[T]he scholarly discussion of Originalism has gotten more sophisticated in the last decade or so. The Originalism that is so problematic is now typically called "original expectations" originalism. It is the kind of Originalism that Justice Scalia

the law that accounts for changes in the circumstances of today's less affluent.

This is not to deny that at times original meaning is important. For example, Article III, the constitutional provision on the judiciary, refers to jurisdiction over *federal* “cases” while its *diversity* jurisdiction references “controversies,” suggesting that there were less inhibitions on courts’ power in deciding federal questions. But the Supreme Court’s 1793 decision in *Chisholm v. Georgia*<sup>111</sup> made it clear that the word “case” included both federal criminal and civil matters, while “controversy” referred to civil cases, without any differences in scope of review or basis for jurisdiction.<sup>112</sup> Original meaning here was vital.

One danger of originalism is our limited detailed knowledge of early American history: much of the historical discussion of late eighteenth-century meaning that leads to less protection for the disadvantaged relies on fuzzy colonial contemporary contexts at a time when court procedure varied from colony to colony, and was unsettled.<sup>113</sup> The outstanding authority on

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often seems to embrace. But there is another originalism: “original public meaning” originalism. On the latter sort of Originalism, please [see] “The New Originalism,” by Princeton Professor Keith Whittington [2 GEO. J.L. & PUBLIC POL’Y (2004).] Please read, too, pages 1-12 of the attached draft [of mine] on capital punishment, where I say “yes” to Originalism but “no” to Scalia. There is a sense in which we are all originalists now—but Originalism in the sense of what Whittington calls the “new” Originalism.

Letter from Michael J. Perry, Robert W. Woodruff Professor of Law, Emory Law School, to Jack B. Weinstein, Senior Judge, U.S. Dist. Court for the E. Dist. of New York (July 24, 2007). I assume, despite strong arguments to the contrary, that judicial review and therefore the debate on originalism is well founded. *But see* LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

<sup>111</sup>2 U.S. 419, 431-32 (1793).

<sup>112</sup>*Id.*

<sup>113</sup>I touched on this problem in the *Kahn* sentencing case when I refused to sentence a business man to a long prison term for carrying cash to needy families in Pakistan from their United States relatives without declaring it. *United States v. Khan*, 325 F. Supp. 2d 218, 234

colonial procedure, Julius Goebel, Jr., put the matter well:

Our profession . . . has made a cult of its historical method . . . . In America, at least, this ritual has become a matter of mechanical gesture, bereft of all piety, pervaded with pettifoggery. For here this method to which jurists point with pride has been used for but mean tasks. It is the small and immediate issues of instant litigation which [look] . . . to the past in a myopic search for ruling cases and precedents.<sup>114</sup>

In the recent important *Crawford* hearsay-constitutional case, shifting from “reliability” to an as yet undefined “testimonial” test, the historians’ view is that Justice Scalia who wrote for the majority got the story wrong.<sup>115</sup> Confirming in part Professor Goebel’s jaundiced view of the judge as historian, Justice Scalia has himself recognized that, “the use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>116</sup>

I am not suggesting that law students eschew the study of history. Knowledge of the

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(E.D.N.Y. 2004).

<sup>114</sup>JULIUS GOEBEL, JR., *FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW* xxxiii (1976). For a detailed description of my view of the historical methods difficulties in constitutional interpretation, see *Kahn*, 325 F. Supp. 2d at 226-32.

<sup>115</sup>See, e.g., Robert M. Pitler, *Introduction*, Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, *id.* at 35; Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, *id.* at 105; Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, *id.* at 219; Peter Tillers, *Legal History for a Dummy: A Comment on the Role of History in Judicial Interpretation of the Confrontation Clause*, *id.* at 235; David Crump, *The Case For Selective Abolition of the Rules of Evidence*, 35 HOEFSTRA L. REV. 585, 619 n.140 (2006); Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007) (clerk for Justice Scalia during term when *Crawford* was written); Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule,” A Reply to Mr. Kry*, *id.* at 557; Jonathan F. Mitchell, *Apprendi’s Domain*, 2006 SUP. CT. REV. 297, 298-99 (history in *Apprendi* “patently false”); see also Symposium, *Crawford and Beyond: Revisited in Dialogue*, 15 J.L. & POL’Y 333 (2007).

<sup>116</sup>*Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (quoting Judge Harold Leventhal).

development of our legal and other institutions is critical to a lawyer's doing more than scrivener's work.<sup>117</sup>

When early narrative is deemed critical it seems best to do what the Supreme Court did in *Brown*: It asked for expert advice and for briefs and reargument on the historical meaning of the Fourteenth Amendment in school segregation issues. The historians' answers in that case satisfied no one. So the Court decided the case on the principle that *Plessy*'s separate but equal ruling was inconsistent with real world equality in fact.

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<sup>117</sup>Possibly the most valuable course I took in law school was one dealing with the development of British legal institutions and their American reception given by Professor Julius Goebel, Jr. See also, e.g., Harold P. Southerland, *The Case For American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661 (2007).

## VI. “People” Requires that None Be Excluded

When Lincoln used the word “*people*” he appreciated that meaning varies with content—but that none could be excluded from a definition that includes all in the universe of humans.<sup>118</sup> It includes for many purposes “*all*” within the nation’s borders; their rights include most of those in the Constitution. Non-citizens are to a large degree protected from our government’s abuse even when they are not in this country, a matter being worked out in the Guantánamo and related terrorism cases. This broad view of those to whom we are responsible was established in principle by the Declaration of Independence. It is the self-evident predicate on which our nation is established: “*All* men are created equal . . . with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted . . . .”<sup>119</sup>

### Expansion by Constitution, Statute and Social Acceptance

Earlier, when the Constitution was adopted, “people,” as a practical matter, meant voters: white men who had substantial property. Most people were excluded.<sup>120</sup> Particular secular or

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<sup>118</sup> See CHARLES FRIED, *MODERN LIBERTY, AND THE LIMITS OF GOVERNMENT* 54-55 (2007) (“Behind the embrace of equality as an ultimate end is a conception of the worth of persons;” persons are humans with no differentiation based on appearance “to exclude from the circle of community;” Blacks and Whites are equal; relying on Lincoln’s 1854 speech on slavery); see also Muhammad’s Farewell Sermon in 632 A.D.:

O People. . . . [A]ll mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over a black, nor a black has any superiority over a white—except by piety and good action.

RUQAIYYAH MAQSOOD, *ISLAM* 19 (1994).

<sup>119</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

<sup>120</sup> In the election of 1800, “[o]ut of a total U.S. population of 5.3 million, roughly five

religious views were, however, never a basis for exclusion.<sup>121</sup> The concept “men” was broadened prior to the Civil War by extending suffrage through the Jacksonian years.<sup>122</sup>

As a result of our Civil War, “people” in theory included all men, regardless of race. Through amendments to the Constitution and statutes and by common agreement, the concept has continued to expand. The Constitution was broadened explicitly to include women<sup>123</sup> and young people from eighteen on<sup>124</sup> through the right to vote. Abolition of the poll tax<sup>125</sup> by amendment eliminated economic station as an exclusionary characteristic.

Particularly after World War II, a broadened concept of who should participate equally in government and society has been accepted. Exclusionary rules for immigrants on the basis of race and country of origin have been abandoned. Sexual preference and other formerly discriminatory classifications such as those of the “disabled” have been limited by constitutional interpretation and statutes. And, in “Great Society” legislation we have tried to lift poor people. Whether all potential voters are equal is a matter I’ll touch on below when discussing voting.

The borderline between “people” and others is not precise: children and non-citizens are

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hundred and fifty thousand were enfranchised.” Jill Lepore, *Party Time: Smear Tactics, Skulduggery and the Début of American Democracy*, NEW YORKER, Sept. 17, 2007, at 94, 96.

<sup>121</sup>U.S. CONST. art. VI (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

<sup>122</sup>SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005). Expansion of rights did not include, in Jackson’s view, protection of Native Americans; to them he was sometimes particularly cruel. See H. W. BRANDS, *ANDREW JACKSON: HIS LIFE AND TIMES* 536-37 (2005); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JOHNSON* 310 (1953) (expansion of voting to urban non-propertied workers).

<sup>123</sup>U.S. CONST. amend. XIX.

<sup>124</sup>*Id.* amend. XXVI.

<sup>125</sup>*Id.* amend. XXIV.

examples.

### Children

The question of freedom of speech for juveniles in school pits our desire to treat youngsters as people entitled to respect for their opinions against the limits due educational demands to check and instruct. While students do not shed constitutional rights at the schoolyard gate, the Supreme Court has tended to favor the instructor's authority. Such a case was *Morse v. Frederick*<sup>126</sup> in which, at an off-campus school activity, a student's banner reading "Bong Hits 4 Jesus" was confiscated by school authorities. A majority of six on the Court found this to be no violation of constitutional rights. Having lived through the often useful student dissents of the sixties that helped open up society, I would have favored more flexibility.<sup>127</sup> Treating students as adults as much as is practicable creates risks of safety and boorishness, but tends to encourage more responsibility.<sup>128</sup>

Nevertheless, I strongly agree with the Court's decision in *Winkelman v. Parma City School District*,<sup>129</sup> allowing the parent as well as the child to prosecute claims under the Individual with Disabilities Education Act. The economic and affectionate interests of the parent should be sufficient to support standing. Suits against those school administrators who deny

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<sup>126</sup>127 S. Ct. 2618 (2007).

<sup>127</sup>See James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991) (opposing "thought control" on campus); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 834-35 (16th ed. 2007).

<sup>128</sup>See, e.g., Andrew Schepard & Theo Liebmann, *N.Y. Judges to Consult with Children at Permanency Hearings*, N.Y.L.J., Sept. 14, 2007, at 3 ("Giving such youth the opportunity to formulate a view and share it with the judge is a powerful antidote to insecurity and fear.").

<sup>129</sup>126 S. Ct. 1994 (2007).

students their adult rights should result in tort recoveries against the administrators.<sup>130</sup>

### Undocumented Immigrants

In their valuable casebook on constitutional law, Professors Kathleen M. Sullivan and Gerald Gunther begin their discussion of alienage as follows:

The Equal Protection Clause holds that “no *person* shall be deprived of equal protection of the law.” It thus does not condition equal protection on citizenship. Is alienage thus a “suspect” classification? . . . Aliens are legitimately excluded from voting, as the Court has always recognized. Does the justification for heightened scrutiny of alienage classifications rest solely, then on the “political powerlessness” rationale and on the history of discrimination against many groups of aliens? And if heightened scrutiny for alienage classifications *is* justified, may some activities with civic aspects akin to voting be reserved for citizens? The [Supreme Court] cases trace the escalation of scrutiny of most but not all *State* discrimination against noncitizens. [T]he federal government has considerably greater latitude, under the immigration and naturalization power, to discriminate against and among noncitizens given the predominant federal interest in immigration.<sup>131</sup>

Gunther’s and Sullivan’s views resonate with my concerns about a problem beginning to

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<sup>130</sup>See *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (cancellation of a student election because of content of a student newspaper violated the First Amendment. The case was remanded in order to determine if the college administrator was entitled to qualified immunity); see also Karen S. Mathis, *Legal Profession Strove to Live Up to Its Duty to Serve, and Noted the Rule of Law*, NAT’L L.J., Aug. 6, 2007, at 51 (ABA’s “ambitious program to make sure our laws, courts and other institutions meet the needs of young people, who are our nation’s most precious asset”); Advertising Supp., *35 Years of Title IX: Championing Equal Opportunities for Women and Girls in Sports*, N.Y. TIMES SPORTS MAG., Aug. 19, 2007.

The questions of when or whether a fetus should be treated as a “person” is beyond the scope of these notes.

<sup>131</sup>KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 604 (16th ed. 2007) (emphasis in original); see also PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (1998); IMMIGRATION STORIES (David A. Martin & Peter H. Schuck eds., 2005); RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 3 (2006) (“Early Americans viewed alien suffrage as an effective method to encourage newcomers to make the U.S. their home.”); *Leviticus* 19:33, 34 (King James) (“And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt . . .”).

be addressed by our international partners and by us: the rights of immigrants with families, separated from their United States citizen children and spouses after years of work here, and put out of the country with almost no recourse.<sup>132</sup>

It is difficult to conceptualize the special problem of non-citizen immigrants within our borders, who may or may not be here legally, and who may or may not be integrated into our society. We recognize basic constitutional rights even for non-citizens.<sup>133</sup> At one time non-citizens were even permitted to vote in most states.<sup>134</sup> Foreigners can own stock and vote as shareholders in corporations that exercise quasi-governmental powers and they are entitled to full protections in criminal and civil cases under our law.

This rule of equal recognition implies that while non-citizens are in the country for more

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<sup>132</sup>*Cf.* James C. McKinley, Jr., *Mexican President Assails U.S. Measures on Migrants*, N.Y. TIMES, Sept. 3, 2007, at A4.

<sup>133</sup>*Cf.* International human rights covenants. In some local elections non-citizens can even vote as property owners or renters. *See Kramer v. Union Free Sch. Dist. No. 15*, 259 F. Supp. 164 (E.D.N.Y. 1966), *rev'd*, 379 F.2d 491 (2d Cir. 1967), *on remand to*, 282 F. Supp. 70 (E.D.N.Y. 1968), *rev'd*, 395 U.S. 621 (1969). Note the international political problems arising when foreign governments attempt to protect their nationals in the United States. *See* James C. McKinley, Jr., *Mexican President Assails U.S. Measures on Migrants*, N.Y. TIMES, Sept. 3, 2007, at A4 (describing Mexican President's reaction to the crackdown on illegal aliens in the United States, which has led to persecution of immigrant workers without visas); Editorial, N.Y. TIMES, Sept. 9, 2007, at A13 (noting that courts are beginning to strike down harsh local anti-immigrant ordinances).

<sup>134</sup>Zachary R. Dowdy, *His Take on Voting*, NEWSDAY, Sept. 4, 2007, at A3 (noting that New York City allowed non-citizens to vote in public school board elections until 2003). It is not clear who was considered to be a participant in our society upon immigrating here. Note the differences in the right to vote and the various colonial forms of indenture and slavery. There may be a constitutional right of those who are here legally or illegally to participate. *See* RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 3-4 (2006) (as many as 40 states allowed non-citizens to vote until 1926, when post-World War I xenophobia resulted in restrictive immigration laws particularly against Asians, Italians, and Jews); *cf.* Eamon Quinn, *Ireland Learns to Adapt to a Population Growth Spurt*, N.Y. TIMES, Aug. 19, 2007, at A3 (non-Irish citizens allowed to vote in local elections).

than a tourist's stay, they and their children should receive the same schooling, health care, and other protections as a citizen would get.<sup>135</sup> It implies, for example, that when disasters strike, non-citizens are entitled to help equivalent to that received by citizens.<sup>136</sup> Current local tendencies to harass aliens—whether legal or illegal<sup>137</sup>—are not appropriate. The national

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<sup>135</sup>See *Plyler v. Doe*, 457 U.S. 202 (1982) (undocumented children entitled to schooling). Compare Sarah Kershaw, *U.S. Rule Limits Emergency Care for Immigrants*, N.Y. TIMES, Sept. 22, 2007, at A1 (reporting that the federal government told New York State health officials that chemotherapy treatments for illegal immigrants are no longer covered by government-financed emergency medical care program) with Nina Bernstein, *Spitzer Grants Illegal Immigrants Easier Access to Driver's Licenses*, N.Y. TIMES, Sept. 22, 2007, at B1 (announcing new policy in New York State to issue driver's licenses without regard to immigration status). See also Danny Hakim, *Clerks Balk at Proposal on Licenses*, N.Y. TIMES, Sept. 28, 2007, at B1 (interviewing county clerks who oppose New York State Governor Spitzer's plan to issue driver's licenses without regard to immigration status).

<sup>136</sup>See Principle 4 of the Guiding Principles on Internal Displacement:

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

U.N. Econ. & Soc. Council, Sub-Comm. on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN. 4/1998/53/Add. 2 (Feb. 11 1998), reprinted in DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW* 156 (2006).

During the raging California fires of October 2007, “[t]here were Mercedes and Jaguars pulling out, people evacuating, and the migrants were still working.’ Enrique Morones, who helps immigrants in Southern California discussing illegal immigrants left to fend for themselves in wildfires.” *Quotation of the Day*, N.Y. TIMES, Oct. 27, 2007, at 2.

<sup>137</sup>Beth Bar, *Law Raises Obstacles to Hiring of Immigrant Skilled Workers*, N.Y.L.J., Sept. 13, 2007, at 5; Julia Preston, *No Need for a Warrant, You're an Immigrant*, N.Y. TIMES, Oct. 14, 2007, at 3. But see Rondal C. Archibald, *State Steps Gingerly on Immigration*, N.Y. TIMES, Oct. 14, 2007, at A27 (California Governor signs law prohibiting cities from requiring

government has a large degree of freedom to deport undocumented immigrants, but being cruel to them while they are here is indefensible.

The courts have been careful to ensure that undocumented immigrants are afforded due process and a fair application of the law.<sup>138</sup> The Constitution requires that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>139</sup> It also provides, “nor shall any State. . . Deny to *any Person* within its jurisdiction the equal protection of the laws.”<sup>140</sup>

The Equal Protection Clause has been held to apply to the federal government as well as the states. It seems significant that “person” rather than “citizen” is the beneficiary of these protections, adding weight to the contention that a non-citizen is entitled to equal protection. “[T]he Due Process Clause applies to all ‘persons’ within the United States, including non-citizens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>141</sup> This

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landlords to check whether tenants are in the country illegally).

<sup>138</sup>*See, e.g.,* Lopez v. Gonzales, 127 S. Ct. 625, 627 (2006) (holding that conduct which is a felony under state law, but a misdemeanor under federal law, is not an aggravated felony under immigration laws requiring deportation); Vumi v. Gonzalez, No. 05-6185, 2007 U.S. App. LEXIS 20925, at \*2-3 (2d Cir. Aug. 31, 2007) (remanding alien’s asylum application for reconsideration under the proper standard); Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker is Taken Off Case*, N.Y. TIMES, Sept. 20, 2007, at B1; *see also* Beharry v. Reno, 183 F. Supp. 2d 584, 586 (E.D.N.Y. 2002) (relying on international law to protect aliens), *rev’d*, 329 F.3d 51 (2d Cir. 2003); Mojica v. Reno, 970 F. Supp. 2d 130, 182 (E.D.N.Y. 1997) (“Section 440(d) of the AEDPA, which bars legal permanent residents who have been convicted of certain crimes from seeking a discretionary waiver of deportation, may not be applied retroactively to petitioners”); Burger v. Gonzales, No. 03-40395-ag(L), 2007 U.S. App. LEXIS 19737, at \*6 (2d Cir. Aug. 11, 2007) (“aliens, of course, are entitled to due process.”); Amanda Bronstad, *Wide Disparity in Asylum Cases*, NAT’L L.J., Oct. 1, 2007, at 4 (reporting that immigration judges have been accused of abusive behavior).

<sup>139</sup>U.S. CONST. amend. V (emphasis added).

<sup>140</sup>*Id.* amend. XIV, § 1 (emphasis added).

<sup>141</sup>*Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also* *Landon v. Plasencia*, 459 U.S.

means that undocumented children are entitled to schooling<sup>142</sup> and other services.

Courts have recognized that the right to privacy is related to equal protection and due process. This right has been defined as the “right to be let alone.”<sup>143</sup> At the very least, the right to privacy includes the right to procreate.<sup>144</sup> This right covers a person’s relationship with his or her family, including the right to live together and control one’s children without unnecessary government interference.<sup>145</sup> Forcible separation of a non-citizen resident of this country from a citizen child or spouse violates this right to familial integrity.<sup>146</sup> Unnecessary detachment of non-citizens from their citizen spouses and children by forced deportation should be avoided.

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21, 32-33 (1982) (noting that permanent resident aliens are entitled to a high degree of due process, approaching that accorded to citizens); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (1986) (“A state is obligated to respect the human rights of persons subject to its jurisdiction”); *id.* § 722 (“An alien in the United States is entitled to the guarantees of the United States Constitution other than those expressly reserved for citizens.”).

<sup>142</sup>*See Plyler v. Doe*, 457 U.S. 202, 205, 215, 230 (1982) (holding that a Texas statute excluding undocumented children from Texas public schools violates the Equal Protection Clause).

<sup>143</sup>*See Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting)).

<sup>144</sup>*See Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942) (affirming “the right to have offspring” and a prisoner’s consequent right not to be sterilized). The right to privacy also includes the right to marry. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (invalidating a Wisconsin statute that requires a noncustodial parent to obtain a court order before receiving a marriage license because the statute’s requirements constitute an unconstitutional limitation on the fundamental right to marry).

<sup>145</sup>*See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (affirming the “fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (invalidating a statute that arbitrarily defines the “boundary of the nuclear family”).

<sup>146</sup>*See In re Nicholson*, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002).

Inequalities not compelled by law that exist because of an individual's circumstance—physical and mental differences, inheritance, and the like—were realities in 1776 and continue to exist today. But the implication of what we have done over the past 230—and particularly the past sixty—years is clear: wherever practicable, each person in this country should be considered a full-fledged member of our people, afforded an equal opportunity for development, dignity, and participation in our government and society. At least for those who are here, while they are here, the rights of citizens and non-citizens should be the same wherever practicable,<sup>147</sup> except for the right to vote for legislative representation. This approach applies to the right to translated documents<sup>148</sup> and to full due process hearings before deportation. It follows that the courts ought not encourage denigrating local regulations of non-documented immigrants not sanctioned by federal law.<sup>149</sup> The Court of Appeals for the Second Circuit has been particularly forceful in protecting rights of aliens the government seeks to deport through flawed administrative proceedings.<sup>150</sup>

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<sup>147</sup>See Clifford Kraus, *Facing Trial, Government Agrees to Improve Conditions at Immigrant Center*, N.Y. TIMES, Aug. 28, 2007, at A19 (“The federal government and lawyers for immigrant children have announced an agreement to improve living conditions at the nation’s main family detention center for illegal immigrant suspects [in Taylor, Texas].”); Kareem Fahim & David W. Chen, *Police Voice Concerns Over a Directive on Immigrants*, N.Y. TIMES, Aug. 24, 2007, at B5 (racial profiling feared because of New Jersey Attorney General’s direction to local police to question suspects about their immigration status).

<sup>148</sup>United States v. Mosquera, 816 F. Supp. 168 (E.D.N.Y. 1993) (requiring translation of indictment and all other documents).

<sup>149</sup>See, e.g., Julia Preston, *Immigration is at Center of New Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, at A12; Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG., Aug. 5, 2007, at 31 (village board crackdown on illegal immigrants).

<sup>150</sup>Julia Preston, *Big Disparities in Judging Asylum Cases*, N.Y. TIMES, May 31, 2007 (courts of appeals reversing many decisions of immigration administrative judges for lack of proper process); Mark Hamblett, *Second Circuit Finds Board [of Immigration Appeals] Erred by*

## VII. “Of” Requires Easy Access to the Courts

Lincoln’s “of” can be construed in its narrow sense to refer to sovereignty. In place of the sovereign king, the people now rule. Recall the preamble to the Constitution: “We the People of the United States, in Order to form a more perfect Union, establish Justice . . . promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION . . .*”<sup>151</sup>

But I suggest Lincoln meant it in a broader sense. “Of” implies the possessive “our,” a joint ownership or trusteeship. It connotes “our” government, “our” nation, “our” land, “our” water, air and electronic airways.<sup>152</sup> Over all of these, we, the people, and future generations, have an underlying possessory interest.<sup>153</sup>

A judge must remember whose government this is: it is the people’s. This view controls the court’s attitude towards those who come before it. The judges are the representatives of the litigants’ government, there to serve and help them as well as the public at large. The attitude required of the people’s servants plays out in a range of matters from sentencing of individuals by avoiding unnecessary harshness to devising effective techniques for satisfying valid claims of

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*Revoking Asylum*, N.Y.L.J., Aug. 22, 2007, at 1; Peter Applebome, *When an Election Becomes a Forum on Immigration*, N.Y. TIMES MAG., Nov. 11, 2007, at 35 (“fear-mongering over illegal immigrants”).

<sup>151</sup>U.S. CONST. preamble (emphasis added).

<sup>152</sup>The feudal king’s sovereignty was eliminated by the modern fee simple and private property, but the concept remained in 1776 to a limited theoretical extent; I believe this residual idea was embodied in the people’s sovereignty.

<sup>153</sup>See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 6 (2004) (“The people Themselves remained responsible for making things work.”).

large masses of people injured in toxic tort or pharmaceutical cases.

All litigants are in a sense our wards—both plaintiffs and defendants—coming to us for help. We, the judges, are their employees. We are entrusted with the enormous burden of making decisions critical to the lives of others.

The constitutional right to petition the government includes the right to ask the courts for help and to publicize individual grievances through litigation. Since the courts are the people's institutions, it follows that restrictions on access should be as narrow as is practicable. By expanding rules excluding litigants and by placing new burdens on those aggrieved, the courts ignore their obligations to the people who have established the courts.

The doctrines of standing, political question, abstention, preemption, and the Eleventh Amendment are being increasingly utilized to expand limitations on the people's power to question government officials in court. The Supreme Court accepts many fewer cases for review than it did in the past. Various privileges protecting officialdom from challenges to their illegal acts effectively prevent plaintiffs from coming into court. These developments are contrary to the spirit of a government and courts of the people, open to them. I illustrate the point in a variety of ways, particularly by discussing standing. But first it will be useful to touch upon the availability of attorneys, for without them justice is not available in our complicated legal system.

#### Attorney Availability

The goals with respect to attorney availability should be: a lawyer (1) for everyone who needs one, whether as a defendant in a criminal case or a party in a civil case, including a person who cannot afford one;<sup>154</sup> and (2) one well-trained for the particular type of work involved, for example, criminal, welfare, discrimination, elder rights, domestic violence, immigration, or family law.

Not only is effective counsel important to the parties, it is essential to the court. Without the help of an attorney, the court may miss important factual and legal points and in some instances may be short and unfair to an inarticulate or insistent litigant whose claims seem unfounded.<sup>155</sup> We currently have a patchwork only partially meeting counsel requirements.

In the country as a whole, the situation is clearly unsatisfactory. New York State is probably better than average, but its non-system is subject to criticism. The current representation scheme includes regulated contingency fees; special statutes for compensation such as the federal Criminal Justice Act and Section 1988;<sup>156</sup> state 18-B appointments;<sup>157</sup> pro bono committees, private firms and attorneys; special interest organizations such as the NAACP

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<sup>154</sup>Andrew Rush, *Closing the Justice Gap a Top Priority: President Madigan Looks for New Opportunities to Fund Legal Services*, N.Y. ST. B.A. STATE BAR NEWS, Sept.-Oct. 2007, at 1 (referencing the New York State Bar Association's "Civil Gideon" project).

<sup>155</sup>*See, e.g.*, Cynthia Gray, *Pro Se Litigants and Judicial Demeanor*, 29 JUD. CONDUCT REP., Summer 2007, at 3.

<sup>156</sup>Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2007)); *cf.* 42 U.S.C. § 1973l(e) (2007). *See generally* ALAN HIRSCH & DIANE SHEEHEY, *AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION* (Fed. Jud. Center, 2d ed. 2005). New York has a state "Equal Access to Justice Act," similar to the federal act, providing for fees against the State. N.Y. C.P.L.R. 8601 (McKinney Supp. 2007).

<sup>157</sup>N.Y. COUNTY LAW § 722-b (McKinney 2004 & Supp. 2007).

Legal Defense Fund and Sanctuary for Families Legal Center for Battered Women’s Services; law school clinical programs; and state legal aid and federal defender government financed organizations.

My experience in the *Nicholson*<sup>158</sup> case involving abused women in the New York Family Courts, and in the disposition of many hundreds of habeas corpus, criminal, and civil cases based on civil rights and discrimination, has left me with a disquieting feeling that many who desperately need a good lawyer’s help fall between the cracks of a jerry-built, even if often admirable, non-system.<sup>159</sup> The statistics demonstrate those failures: in many states, “[s]wollen public defender caseloads” have forced public defender attorneys to try cases on just a few hours’ (or minutes’) notice.<sup>160</sup> On the civil side, “a mere one-fifth of the civil legal service needs of low income New Yorkers are being met.”<sup>161</sup>

In the comments below, I intermingle civil (plaintiff and defendant) and criminal (primarily defendant) representation because I believe they raise the same issues of attorney availability, compensation, and training. For this purpose, the federal and state systems should be treated as an integrated whole.

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<sup>158</sup>*Nicholson v. Williams*, 205 F.R.D. 92 (E.D.N.Y. 2001); *In re Nicholson*, No. 00-CV-2229, 201 U.S. Dist. LEXIS 22322 (E.D.N.Y. 2001); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); *In re Nicholson*, 181 F. Supp. 2d 182, 187, 192 (E.D.N.Y. 2001).

<sup>159</sup>COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 18, 2006).

<sup>160</sup>Tresa Baldas, *As Caseloads Swell, Public Defenders Feel the Heat: Jailings, Appeals over Hasty Trials Trigger a Call for Caseload Limits*, NAT’L L.J., Sept. 24, 2007, at 7.

<sup>161</sup>Andrew Rush, *Closing the Justice Gap a Top Priority: President Madigan Looks for New Opportunities to Fund Legal Services*, N.Y. ST. B.A. STATE BAR NEWS, Sept.-Oct. 2007, at 1.

## Criminal Cases

The right to counsel in criminal cases is enshrined in the United States Constitution.<sup>162</sup> But until 1963, this protection was understood to apply only to defendants charged with crimes in federal court. Nearly forty-five years ago, the Supreme Court held in *Gideon v. Wainwright* that the right to counsel is a fundamental right for defendants facing criminal charges in state courts.<sup>163</sup> In consequence, “the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment require[d] it in a federal court.”<sup>164</sup> The Court emphasized that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>165</sup> Since *Gideon*, the right to counsel has been expanded to appeals, “to any criminal trial, where an accused is deprived of his liberty,”<sup>166</sup> and to suspended sentences where imprisonment is a future possibility.<sup>167</sup> The right to counsel, moreover, is not simply the right to any lawyer; it is the right to the “effective assistance” of counsel.<sup>168</sup> There is still no recognized statutory or constitutional right to counsel in the majority of civil cases.

A criminal defendant’s right to counsel in New York State is somewhat broader than

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<sup>162</sup>U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

<sup>163</sup>*Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>164</sup>*Id.* at 340.

<sup>165</sup>*Id.* at 344.

<sup>166</sup>*Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972).

<sup>167</sup>*Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

that guaranteed under the United States Constitution or federal statutory law. In 1965, the New York Court of Appeals extended the rights promised by *Gideon* to more defendants in New York Courts.<sup>169</sup> Under the New York Constitution<sup>170</sup> and New York County Law Article 18-B (“18-B”), enacted in 1965, attorneys must be provided for every indigent defendant charged with any crime,<sup>171</sup> including a misdemeanor; parties and minors in New York Family Court are covered.<sup>172</sup> Article 18-B directed each county to develop its own plan to provide such legal services. In partial response, when I served as the County Attorney of Nassau County, I helped found the Nassau Law Services Committee, Inc., in 1966. Now known as the Nassau/Suffolk Law Services Committee, Inc., it was the first federally financed legal services corporation in New York State.<sup>173</sup>

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<sup>168</sup>See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

<sup>169</sup>*People v. Witek*, 207 N.E.2d 358, 360 (N.Y. 1965).

<sup>170</sup>N.Y. CONST. art. 1 § 6.

<sup>171</sup>See, e.g., *People v. Arthur*, 22 N.Y.2d 325 (1968); *People v. Benevento*, 91 N.Y.2d 708 (1998); see also THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 13 (June 16, 2006). The availability of community courts dealing with problems that can be decriminalized may provide a substitute for defense counsel in minor run-ins, but I would be more comfortable if defense counsel were always available. See Bernice Young, *A Court Where Solutions Rule*, S.F. CHRON., Aug. 12, 2007, at C3 (avoiding revolving door justice through use of Community Courts based on the Midtown Community Court in Manhattan).

<sup>172</sup>N.Y. COUNTY LAW § 722-b (McKinney 2004 & Supp. 2007); see also N.Y. FAM. CT. ACT § 262 (McKinney 1999 & Supp. 2007); N.Y. CRIM. PROC. LAW § 180.10 (3)(c) (McKinney 1993 & Supp. 2007); N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1993 & Supp. 2007); N.Y. CRIM. PROC. LAW § 210.15 (2)(c) (McKinney 1993 & Supp. 2007); THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 16 (June 16, 2006).

<sup>173</sup>Jack B. Weinstein, *Legal Assistance to the Indigent in Nassau County*, N.Y.L.J., Dec.

A critical problem in both the federal and state criminal justice systems is the terrible undercompensation of court-appointed attorneys representing the poor, leading to the lack of available attorneys, poor quality, and assembly-line representation primarily consisting of plea bargaining immediately upon arraignment.<sup>174</sup> In federal court, criminal defense for the poor is provided by a combination of full-time federal public defenders who earn salaries, and court-appointed lawyers—called “CJA panel attorneys” after the Criminal Justice Act,<sup>175</sup> pursuant to which they are appointed—who bill by the hour.<sup>176</sup> The gap in the quality of defense provided by public defenders and CJA panel attorneys has been noted by some, with public defenders obtaining more acquittals and shorter sentences for their clients.<sup>177</sup> While this difference may in part be due to CJA attorneys’ lack of experience handling criminal cases and interacting with

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8, 1965.

<sup>174</sup>See Tresa Baldas, *As Caseloads Swell, Public Defenders Feel the Heat: Jailings, Appeals over Hasty Trials Trigger a Call for Caseload Limits*, NAT’L L.J., Sept. 24, 2007, at 7; *Committee Works to Assure Effective Representation: An Interview with Judge John Gleeson, Chair of the Judicial Conference Committee on Defender Services*, THIRD BRANCH, Sept. 2007, at 10, available at <http://www.uscourts.gov/ttb/2007-09/interview/index.html>; see also, e.g., Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs [for Defense Counsel] Grow Daunting*, N.Y. TIMES, Nov. 4, 2007, at A1.

<sup>175</sup>18 U.S.C. § 3006A(b) (2007).

<sup>176</sup>Adam Liptak, *Public Defenders Get Better Marks When on Salary*, N.Y. TIMES, July 14, 2007, at A1.

<sup>177</sup>*Id.*; see Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat’l Bureau of Econ. Research, Working Paper No. 13187, June 2007), <http://www.nber.org/papers/w13187>; *Committee Works to Assure Effective Representation: An Interview with Judge John Gleeson, Chair of the Judicial Conference Committee on Defender Services*, THIRD BRANCH, Sept. 2007, at 10 (“[J]udges saw a significant disparity between the quality of representation provided by federal defenders and that provided by panel attorneys (93.3 percent viewed the overall quality of federal defenders as ‘very good’ or ‘excellent,’ compared to 71.3 percent for panel attorneys.”)).

prosecutors, it may also be related to the lower monetary incentives for CJA attorneys.<sup>178</sup> CJA panel attorneys are necessary to carry the full load, however, especially in multiple-defendant cases where there are potential conflicts of interest; in our district they are carefully screened and monitored, and they provide fine representation.

Federal courts have generally tried to match compensation of court-appointed attorneys with rising costs.<sup>179</sup> Currently, CJA panel attorneys are paid an hourly rate of up to \$94 per hour (likely to soon increase) and, in capital cases, up to \$166 per hour (with modifiable caps of \$7000 per felony case, \$2000 per misdemeanor, and \$5000 per appeal).<sup>180</sup> While this might seem high, after taking into account an attorney's average overhead cost of \$64 per hour (which is higher in the New York metropolitan area), CJA attorneys net only \$30 per hour.<sup>181</sup>

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<sup>178</sup> *Id.* at 10 (“The quality of representation provided by panel attorneys is inextricably linked to the adequacy of the hourly rate, and also depends on the availability of sufficient funding for other defense services, such as investigators and experts.”); Adam Liptak, *Public Defenders Get Better Marks When on Salary*, N.Y. TIMES, July 14, 2007, at A1.

<sup>179</sup> *See, e.g.*, Memorandum to the Chair and Members of the [United States] Jud. Conf. Committee on Defender Services, Panel Attorney Compensation Rates Request for FY 2009. Compare this with the absurd hourly fees, and, worse, the caps on compensation in many states that in effect instruct counsel for the poor to carry on a sham defense. *See* Malia Brink, *Indigent Defense National Association of Criminal Defense Lawyers*, CHAMPION, Aug. 2007, at 53; *see also* *Committee Works to Assure Effective Representation: An Interview with Judge John Gleeson, Chair of the Judicial Conference Committee on Defender Services*, THIRD BRANCH, Sept. 2007, at 10 (“For FY08, the Judiciary is requesting that Congress fund an increase in the noncapital hourly rate from \$94 to \$113 (and in the capital rate from \$166 to \$169),” though this is still less than the statutorily authorized level).

<sup>180</sup> 18 U.S.C. § 3006A (2007). Such caps can be waived “for extended or complex representation whenever the court . . . certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.” *Id.*

<sup>181</sup> *Committee Works to Assure Effective Representation: An Interview with Judge John Gleeson, Chair of the Judicial Conference Committee on Defender Services*, THIRD BRANCH,

Effective counsel in state and federal collateral attacks on convictions is particularly important because of numerous barriers. Among them are the: short one-year statute of limitations, making speed in gathering and analyzing evidence essential—a very difficult task for the usually ill-informed and ill-educated pro se inmate in prison; limits on second and successive applications, meaning that the prisoner must get the theory exactly right the first time; and, for state convictions, required exhaustion of state collateral remedies, an often daunting task. If the claim was “adjudicated on the merits in state court,” the petitioner has the burden of showing that the state court decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court,<sup>182</sup> something hard to do unless adequate counsel in state court first provided a basis for the federal petition.

Adequate *privately financed* counsel would presumably have appealed a state conviction and then attacked it collaterally in state court; swiftly filed and pursued a federal petition on all viable grounds; and sought a certificate of appealability. Do appointed counsel have the same will, skill and resources to effectively represent a prisoner through extended highly technical post-conviction litigation? Only sometimes.

There are not now enough lawyers willing and able to provide effective counsel for collateral attacks in state and federal proceedings despite our increasing knowledge of widespread unfair convictions. Procedural barriers largely block effective habeas corpus relief unless counsel is available for all phases of possible collateral attacks. In a detailed study of

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Sept. 2007, at 10.

<sup>182</sup>Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241 *et seq.* (2006)).

thirteen federal districts, in ninety-three percent of non-capital cases the petitioner had no counsel and evidentiary hearings were “rare.”<sup>183</sup>

Only after hearing many hundreds of habeas cases did I begin to appreciate the need to appoint counsel in every one of them. The Court of Appeals for the Second Circuit quite properly wants lawyers in all habeas evidentiary hearings and demands more of those hearings.<sup>184</sup> My impression is that we do not have the resources to provide adequate counsel in every habeas case—even in instances where we are left with lingering doubts over whether justice has been done. The reality is that our supply of good lawyers who will take cases for the poor is limited. A judge should not have to ask if the party’s claim warrants exhaustion of the supply of effective available attorneys for the poor when she considers appointment of counsel for a pro se litigant.

The dilemma for the courts and the bar become even more troubling in light of a particularly serious potential consequence of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).<sup>185</sup> It provides for “expedited procedures in federal capital habeas corpus cases

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<sup>183</sup>NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 5 8 (Aug. 21, 2007) (the statistics cited in the text did not include New York’s districts). I would like to see a study of New York practice. New York, I believe, has a far higher percentage of federal non-capital habeas cases where counsel are present, and the number of evidentiary hearings is probably also higher.

<sup>184</sup>*See, e.g.*, *Graham v. Portuondo*, No. 04-1315-pr, 2007 U.S. App. LEXIS 23088 (2d Cir. Oct. 3, 2007) (holding that counsel must be appointed to all indigent petitioners for all evidentiary hearings, and remanding).

<sup>185</sup>Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241 *et seq.* (2006)).

when a state is able to establish that it has provided qualified, competent, adequately resourced, and adequately compensated counsel in state post-conviction proceedings to inmates facing a capital sentence.”<sup>186</sup> Because the proposed regulations by the Department of Justice fail to include any standards by which to measure “competency” and “adequate compensation,” this provision may pose a serious constitutional threat,<sup>187</sup> even though no state has yet qualified for the expedited process.

### Immigrants

There is no right to counsel at government expense in immigration proceedings.<sup>188</sup> Because so many immigrants are destitute and are prohibited from legally working during most of the application process, few have the money to hire a lawyer.<sup>189</sup> As a result, “65% of aliens whose cases were completed in immigration courts during [fiscal year] 2005 were unrepresented.”<sup>190</sup> Considering that our immigration courts handled almost 369,000 cases in 2005,<sup>191</sup> there is a huge number of people who need legal help but do not get it.

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<sup>186</sup>*Judiciary Expresses Concerns About Proposed Regulations Regarding Capital Cases*, THIRD BRANCH, Sept. 2007, at 9.

<sup>187</sup>*Id.*

<sup>188</sup>8 U.S.C. § 1362 (2007).

<sup>189</sup>Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, The Orison S. Marden Lecture of the Association of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor 3 (Feb. 28, 2007), *available at* [http://www.abanet.org/publicserv/immigration/katzmann\\_immigration\\_speech.pdf](http://www.abanet.org/publicserv/immigration/katzmann_immigration_speech.pdf); *see* 8 C.F.R. § 208.7(a) (2007).

<sup>190</sup>Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor 12 (Feb. 28, 2007).

<sup>191</sup>*Id.* at 5.

What is particularly troubling about immigration proceedings is the dramatic difference legal representation makes. According to a recent study:

In political asylum cases, 39% of non-detained, represented asylum seekers received political asylum, compared with 14% of non-detained, unrepresented asylum seekers. Eighteen percent of represented, detained asylum seekers were granted asylum, compared to three percent of asylum seekers who lacked counsel.<sup>192</sup>

These numbers are particularly startling considering that many immigration lawyers provide “barely competent” representation, making “often boilerplate submissions,”<sup>193</sup> partly because a small law office may be handling thousands of cases at a given time.<sup>194</sup>

For overworked immigration judges who dispose of about 1,400 cases annually and Board of Immigration Appeals members who handle eighty per week,<sup>195</sup> well-briefed and argued cases are essential. Even when the applicant is represented, however, harried “immigration Judges can[not] be expected to make thorough and competent findings of fact and conclusions of law . . . .”<sup>196</sup> As Judge Robert A. Katzmann of the Second Circuit Court of Appeals declared,

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<sup>192</sup>*Id.* at 2 fn.2.

<sup>193</sup>*Id.*, quoted in Mark Hamblett, *Study Finds ‘Quite Extreme’ Disparities in Immigration Judges’ Asylum Rulings*, N.Y.L.J., Oct. 4, 2007, at 1. Note that there is also a large problem with indigent defense bar’s limited knowledge about the immigration consequences of guilty pleas, even for immigrants who are legal permanent residents.

<sup>194</sup>In the Orison S. Marden Lecture, Judge Katzman pointed out that as of April 2005, ten law offices, mostly solo practitioners, were handling just under 35% of the thousands of petitions for review at the circuit. Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, *The Orison S. Marden Lecture of the Association of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor* 4 (Feb. 28, 2007).

<sup>195</sup>*Id.* at 4.

<sup>196</sup>*Id.* (quoting *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2006) (testimony of Chief Judge John M. Walker, Jr., U.S. Court of Appeals for the Second Circuit)).

“[b]ecause equal justice under the law is a fundamental goal of American jurisprudence, the new findings about the day-to-day operations of the immigration courts are disturbing.”<sup>197</sup> These findings support an urgent need for good counsel to all who appear in these administrative courts.

### New York State Courts

Compensation for criminal defense attorneys in state courts is substantially lower than that provided under the federal Criminal Justice Act, resulting in relatively fewer qualified attorneys to represent indigent criminal defendants. New York State should consider overhauling its current system if it is to avoid continuing scandals, such as those in local town and village courts denying criminal defendants their right to counsel or appointing lawyers who refused to visit or communicate with their clients.<sup>198</sup>

Criminal defense attorneys for the poor in state court usually fall into one of three categories: full-time public defenders who are paid a salary; court-appointed private attorneys assigned on a systematic or ad hoc basis paid by the hour; and private attorneys or non-profit organizations such as Legal Aid that contract with the state to provide representation in criminal cases.<sup>199</sup> According to a report by the Commission on the Future of Indigent Defense Services, “New York is one of only six states that have no statewide responsibility or oversight for

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<sup>197</sup>Mark Hamblett, *Study Finds ‘Quite Extreme’ Disparities in Immigration Judges’ Asylum Rulings*, N.Y.L.J., Oct. 4, 2007, at 1.

<sup>198</sup>Melanie Trimble & Corey Stoughton, Op-Ed, *State Must Reform the Justice System*, TIMES-UNION, Oct. 29, 2006, at B2.

<sup>199</sup>THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 1-2 (June 2007).

indigent criminal defense.”<sup>200</sup> Under New York County Law Article 18-B, each of the state’s sixty-two counties decide how to meet its obligation to provide counsel for indigent defendants and for civil litigants in Family Court.<sup>201</sup> Article 18-B does not provide uniform standards or a system for evaluating the quality of representation provided by court-appointed counsel.<sup>202</sup>

At the time of its enactment in 1965, Article 18-B set attorney compensation at \$10 per hour for out-of-court work and \$15 per hour for in-court work; these rates were later increased to \$25 and \$40, respectively, in 1986.<sup>203</sup> But between 1986 and 2002, the rate was not increased to account for inflation. As a result, I found in *Nicholson* in 2002 that mothers in New York Family Court were not receiving effective assistance of counsel because the low fees had driven away the better panel attorneys. I ordered the fees increased,<sup>204</sup> and issued an injunction temporarily requiring New York State to increase its fee to \$90 per hour with a modifiable cap of \$1,500.<sup>205</sup> The New York Legislature then increased the rates of compensation to \$60 per hour for misdemeanors (with a cap of \$2,400 per case) and \$75 per hour for felony cases,

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<sup>200</sup>COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 27 (June 18, 2006).

<sup>201</sup>N.Y. COUNTY LAW § 722-b (McKinney 2004 & Supp. 2007); *see also* COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 7 (June 18, 2006); Tammy S. Korgie, *The 18-B Experience: Court-Appointed Attorneys Face Legal and Financial Challenges*, N.Y. ST. B.A.J., May 2001, at 8.

<sup>202</sup>COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 7 (June 18, 2006).

<sup>203</sup>*Id.* at 7-8.

<sup>204</sup>*In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002).

<sup>205</sup>*Nicholson v. Williams*, 294 F. Supp. 2d 369, 422 (E.D.N.Y. 2003).

Family Court cases, and all other eligible cases (with a cap of \$4,400 per case), unless “extraordinary circumstances” require exceeding those caps.<sup>206</sup> These fees need to be substantially raised.

Appointed counsel fees must be regularly increased to account for inflation. The low per hour fee that I found in New York Family Court was perhaps barely acceptable at one time, but was a disgrace by 2002 when I decided *Nicholson*.<sup>207</sup> Provision for the appointment of experts, as in federal practice, should be included in the structure. The shortage of adequate defense is not limited to 18-B attorneys; in many states, “[s]wollen public defender caseloads” have forced public defender attorneys to try cases on just a few hours’ (or minutes’) notice.<sup>208</sup>

For indigent criminal defendants, my experience supports the central recommendation in the Final Report of the Commission on the Future of Indigent Defense in New York, convened by Chief Judge Judith Kaye in 2004 to examine the problem of indigent criminal defense.<sup>209</sup>

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<sup>206</sup>S. 1406-B/A. 2106-B (Chapter 62 of the Laws of 2003); COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 12-13 (June 18, 2006). Because the state did not *fund* the increase until 2005, however, in 2003 another court also found that New York State’s failure to increase the rate from \$40 per hour was continuing to violate defendants’ constitutional right to meaningful and effective representation. *N.Y. County Lawyers’ Ass’n v. State of New York*, 196 Misc. 2d 761 (N.Y. Sup. Ct. 2003).

<sup>207</sup>*Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); *see also In re Nicholson*, 181 F. Supp. 2d 182, 187, 192 (E.D.N.Y. 2001).

<sup>208</sup>Tresa Baldas, *As Caseloads Swell, Public Defenders Feel the Heat: Jailings, Appeals over Hasty Trials Trigger a Call for Caseload Limits*, NAT’L L.J., Sept. 24, 2007, at 7. I found this true when I volunteered for Legal Aid in the summer of 1953, and had to try cases with almost no preparation.

<sup>209</sup>Press Release, N.Y. State Unified Ct. Sys., *The Future of Indigent Defense Services in New York: Topic of New Commission’s Inquiry* (May 17, 2004), [http://www.courts.state.ny.us/press/pr2004\\_09.shtml](http://www.courts.state.ny.us/press/pr2004_09.shtml).

After finding that New York’s indigent defense system is in crisis and that poor people are receiving inadequate representation, the report called for a centralized, fully-funded, independent public defense office with well-defined uniform standards for determining the eligibility of appointed counsel.<sup>210</sup> Such an independent statewide defender system is essential to provide a constitutionally adequate level of representation.

### Training

Effective assistance of counsel necessitates well-informed, disciplined, organized, and up-to-date counsel. Judge John Gleeson of the Eastern District of New York, the Chair of the Federal Judicial Conference Committee on Defender Services, has suggested a course of study to be conducted by one or more law schools to provide training to both full-time professional defense staff and members of panels of court-appointed attorneys. The training should be equivalent to that of our United States Attorneys.<sup>211</sup> This is an excellent idea. An untrained, well-intentioned pro bono practitioner may be admirable but often will not suffice, and may even create additional hazards.

In our Eastern District, we hold seminars for our mediators, arbitrators, and pro bono panelists from time-to-time to try to ensure they have an adequate understanding of what the law is and what we expect. Seminars on matters of sentencing, law and technology, and the like

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<sup>210</sup>COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (June 18, 2006), *available at* [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

<sup>211</sup>Conversation between author and Judge John Gleeson, Chair of the Judicial Conference Comm. on Defender Servs., in Brooklyn, N.Y. (October 2007).

probably improve both quality of representation and morale of the panel members.<sup>212</sup> A systematic training program, improved and extended state-wide which offers CLE credit and certification as a specialist, is necessary to ensure that state and federal counsel are more effective.

#### Other Sources of Help

There are other devices to provide counsel. State Attorneys General may, under the principle of *parens patriae*, bring civil suits on behalf of injured citizens.<sup>213</sup> Some federal statutes allow recovery of attorney and expert witness fees for a party who prevails in a suit against the government,<sup>214</sup> contrary to the American rule that civil litigants bear most of their own cost of litigation.

The contingent fee system is the main pragmatic American solution; attorneys represent a plaintiff in exchange for a percentage of their recovery, if any. Though this system is

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<sup>212</sup>*Committee Works to Assure Effective Representation: An Interview with Judge John Gleeson, Chair of the Judicial Conference Committee on Defender Services*, THIRD BRANCH, Sept. 2007, at 10, available at <http://www.uscourts.gov/ttb/2007-09/interview/index.html>.

<sup>213</sup>*See Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639 (S.D.N.Y. 2007) (holding that plaintiff's claim for punitive damages was barred by prior settlement in a *parens patriae* suit filed by the New York Attorney General against defendant cigarette companies).

<sup>214</sup>*See, e.g.*, Equal Access to Justice Act, 28 U.S.C. §§ 2412(b), (d)(1)(A) (2007) (authorizing a court to award legal fees to a prevailing party other than the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."); Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 42 U.S.C. § 2996f(a)(11) (2007); 18 U.S.C. § 983 (2007) (providing for the payment of reasonable attorney fees and other litigation costs to a prevailing party other than the United States in a civil proceeding to forfeit property); *United States v. Khan*, 497 F.3d 204, 208, 211 (2d Cir. 2007) (describing statutes providing for attorneys' fees for those in conflict with the government, including Equal Access to Justice Act).

frequently criticized, when properly regulated by professional rules of conduct and court supervision, it creates a pool of experienced plaintiffs' attorneys ready to represent clients with meritorious cases suing for money damages. Unless a substantial money recovery is likely so that the attorney can count on a substantial fee, the contingent fee system does not achieve adequate attorney coverage for civil plaintiffs.<sup>215</sup>

Widespread use of advertising by contingency fee attorneys through television and other media sometimes makes us wince because of the evident hucksterism so different from the restrained rainmaking techniques of yesteryear. Yet these techniques, coupled with the contingency fee system, make available legal remedies to millions of workers and their families who would have been unaware of their right to compensation in matters such as asbestos and Social Security disability claims.<sup>216</sup> Recent efforts by states to limit attorney advertising are alleged to be in the public interest, to protect people from bad lawyers.<sup>217</sup> While perhaps well-intentioned, these rules may actually limit effective representation by making a good attorney harder to find. The Federal Trade Commission has warned these states to consider the effect these rules have on competition, highlighting the interest we all share in making it easier to

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<sup>215</sup>*See, e.g., In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002) (ordering increase in attorneys' fees where low fees resulted in an absence of effective representation of mothers in New York Family Court), *modified* in *Nicholson v. Williams*, 294 F. Supp. 2d 369, 422 (E.D.N.Y. 2003).

<sup>216</sup>*See, e.g.,* attack on New York "guidelines" limiting advertising. *Alexander v. Cahill*, No. 5:07-CV-117 (FJS/GHL), 2007 WL 2120024, at \*13 (N.D.N.Y. July 23, 2007) (declaring most of the limitations on advertising unconstitutional); *see also* Joseph Staashenko, *Upset of Few Attorney Advertising Rules Could Signal Return of "Heavy Hitters,"* N.Y.L.J., July 27, 2007, at 1.

<sup>217</sup>New York's rules on attorney advertising went into effect on February 1, 2007. Kimberly Atkins, *FTC Warns States on Attorney Ad Limits*, LONG ISLAND BUS. NEWS.

access counsel.<sup>218</sup>

The federal government now has a number of provisions for compensation of attorneys under civil rights and other statutes.<sup>219</sup> For example, section 1988 gives a court discretion to award reasonable attorneys' fees to the prevailing party in civil rights enforcement action.<sup>220</sup> These provisions seem a desirable way of bringing the entrepreneurial lawyer into the fold and of providing additional financial support to non-profit legal services organizations. Over the last decade, however, the Supreme Court has whittled away the right to attorneys' fees.<sup>221</sup> Congress may wish to consider changes in federal law to restore section 1988 to its original, more expansive definition of "attorneys' fees." New York has some similar provisions, albeit in limited areas.<sup>222</sup> The state could consider a more robust program along these lines.

A recent decision by the Court of Appeals for the Second Circuit in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany* may signal a step backwards

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<sup>218</sup>*Id.*

<sup>219</sup>*See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2007); 42 U.S.C. § 1973l(e) (2007); 20 U.S.C. § 1415(i)(3)(B) (2007).

<sup>220</sup>Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2007); *see also* Christopher Dunn, Column, *Civil Rights Attorneys' Fees Only for Profiteers?*, N.Y.L.J., June 20, 2007.

<sup>221</sup>*See, e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (holding that in order to be eligible for attorneys' fees under civil rights and environmental statutes, plaintiffs must secure a judgment on the merits or a court-ordered consent decree rather than a voluntary change in defendant's conduct).

<sup>222</sup>*See, e.g.*, Equal Access to Justice Act, N.Y. C.P.L.R. 8601 (McKinney Supp. 2007) (allowing attorneys' fee awards to prevailing non-state parties in any civil action brought against the state); N.Y. C.P.L.R. Rule 909 (McKinney 2006 & Supp. 2007) (allowing a court to award attorney's fees in certain class actions).

in the effort to encourage effective experienced pro bono counsel to represent clients in civil rights cases; it suggests limits on fees of pro bono attorneys.<sup>223</sup> By encouraging courts awarding fees under the Civil Rights Attorney's Fees Awards Act to consider factors such as "whether the attorney was initially acting *pro bono* [so] that a client might be aware that the attorney expected low or non-existent remuneration," the *Arbor Hill* court wavered from the principle that attorney fees would be based on market rates.<sup>224</sup> Even though the Court of Appeals later issued an amended opinion to clarify that it does not intend to exclude non-profit organizations or *pro bono* attorneys from the usual fee-shifting mechanism under section 1988,<sup>225</sup> if future courts follow the approach suggested in *Arbor Hill* and consider the fact that *pro bono* attorneys, by definition, are not paid at the market rate, the result will be that public interest organizations will have fewer resources available.

Pro bono legal assistance by private attorneys and public interest organizations provides

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<sup>223</sup>*Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F.3d 110, 111-12 (2d Cir. 2007) (affirming district court's fee award using the "forum rule" and "suggest[ing] that the district court consider, in setting the reasonable hourly rate it uses to calculate the 'lodestar,' what a reasonable, paying client would be willing to pay").

<sup>224</sup>*Id.* at 112, 116, 120; *see* *Blum v. Stenson*, 512 F. Supp. 680 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 493 (2d Cir. 1981), *aff'd in part and rev'd in part*, 465 U.S. 886 (1984) (awarding legal fees using hourly rates derived from the market rates earned by private attorneys in the same district); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2007).

<sup>225</sup>*Arbor Hill*, at 112 n.2 ("Our decision today in no way suggests that attorneys from non-profit organizations or attorneys from private law firms engaged in *pro bono* work are excluded from the usual approach to determining attorneys' fees. We hold only that in calculating the reasonable hourly rate for particular legal services, a district court should consider what a reasonable, paying client would expect to pay."). *But see* *Stenson v. Blum*, 512 F. Supp. 680 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 493 (2d Cir. 1981), *aff'd in part and rev'd in part*, 465 U.S. 886, 894 (1984) ("Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.").

much-needed quality representation. But there is room for improvement; “less than fifty percent of lawyers undertake pro bono work in a given year.”<sup>226</sup> Bar associations should do as much as possible to promote wide-scale recognition of this work, such as offering awards of merit for a certain number of donated hours. Signed by a state or bar association official, it would be a prized wall hanging for most lawyers.

Bear in mind that, in addition to providing technical legal help, lawyers for the poor serve as “friends” their clients can lean on for help and guidance through a frightening and strange system. The work of my former law clerk Marc Falkoff and so many others who have volunteered to help the detainees at Guantánamo Bay and in other difficult situations represents the highest professional efforts of our bar.<sup>227</sup> In our Eastern District we have a privately funded social worker to assist in some cases.<sup>228</sup>

The importance of *pro bono* attorneys has been demonstrated in times of disaster such as the New Orleans Katrina epilogue,<sup>229</sup> or in cases where there is an economic crisis.<sup>230</sup>

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<sup>226</sup>Robert A. Katzmman, Judge, U.S. Court of Appeals for the Second Circuit, *The Legal Profession and the Unmet Needs of the Immigrant Poor: The Orison S. Marden Lecture of the Association of the Bar of the City of New York* 14, Feb. 28, 2007, *available at* [http://www.abanet.org/publicserv/immigration/katzmann\\_immigration\\_speech.pdf](http://www.abanet.org/publicserv/immigration/katzmann_immigration_speech.pdf).

<sup>227</sup>*See, e.g.*, Introduction by Marc Falkoff, *POEMS FROM GUANTANAMO: THE DETAINEES SPEAK* (Marc Falkoff ed., 2007); *see also* Megan O’Roarke, *Shall I Compare Thee to an Evil Tyrant?: The Poetry of Guantánamo*, SLATE, Aug. 20, 2007, <http://www.slate.com/id/2172345/> (“[T]he poems restore individuality to those who have been dehumanized and vilified in the eyes of the public”).

<sup>228</sup>Our social worker is funded through the Eastern District Litigation Fund I founded.

<sup>229</sup>*See, e.g.*, AM. BAR ASS’N, *IN THE WAKE OF THE STORM: THE ABA RESPONDS TO HURRICANE KATRINA, A MIDYEAR ACTIVITY REPORT* (2006), [http://www.abanet.org/op/reports/aba\\_katrinareport.pdf](http://www.abanet.org/op/reports/aba_katrinareport.pdf); *see also* AM. BAR ASS’N, *RULE OF LAW IN TIMES OF MAJOR DISASTER*, [http://www.abanet.org/litigation/ruleoflaw/rol\\_disaster.pdf](http://www.abanet.org/litigation/ruleoflaw/rol_disaster.pdf)

Following Katrina, the American Bar Association recommended a set of rules permitting lawyers to represent clients in states other than their own in times of crisis.<sup>231</sup> If each state promulgates a similar rule, it will be easier for people to find attorneys and for those lawyers to

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(stating principles adopted as policy in August 2007 by ABA House of Delegates):

Principle 11:

To the extent feasible, attorneys should provide emergency free legal services to those affected by a major disaster to address their unmet basic legal needs and should provide ongoing pro bono services to those who are not able to obtain or pay for services on a fee basis.

To the extent feasible, attorneys representing persons affected by a major disaster who claim compensation or assistance because of losses resulting from the major disaster should provide representation either without fee or on a reduced fee basis. In cases where fees are awarded by courts, the fees should be donated to charitable organizations providing assistance to persons affected by the major disaster.

Principle 12:

State, local and territorial Bars should educate their members to plan, prepare and train for a major disaster, including information enabling attorneys to assure the continuity of their operations following a disaster, while maintaining the confidentiality and security of their clients' paper and electronic files and records.

<sup>230</sup>See, e.g., Thomas Adcock, *A Taxing Problem: Pro Bono Project Helps Financially Stressed Seniors to Keep Their Homes; Seeks to Become a National Model*, N.Y.L.J., Aug. 31, 2007, at 24; see also *Settlements in Two Key Cases Will Improve Quality of Life for Thousands of New Yorkers*, ADVANCING ECONOMIC JUSTICE (Nat'l Ctr. for Law & Econ. Justice, New York, N.Y.), Fall 2007, at 1, available at [http://www.nclej.org/documents/NCLEJ\\_news\\_Fall07\\_Web2.pdf](http://www.nclej.org/documents/NCLEJ_news_Fall07_Web2.pdf) (describing recent litigation obtaining relief for 20,000 families with disabled children).

<sup>231</sup>See MODEL CT. RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (2007) (amending MODEL RULES OF PROF'L CONDUCT R. 5.5), <http://www.abanet.org/leadership/2007/midyear/docs/journal/hundredfour.doc>; AM. BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES (Jan. 29, 2007), [http://www.abanet.org/cpr/clientpro/Recom\\_Report\\_Katrina.pdf](http://www.abanet.org/cpr/clientpro/Recom_Report_Katrina.pdf).

provide effective emergency assistance.

In law schools, widespread use of clinics for the poor and disadvantaged has provided a much-needed infusion of *pro bono* legal assistance.<sup>232</sup> Much of the rapid spread of clinical teaching in law schools resulted from a multimillion dollar Ford Foundation grant administered a generation ago by William Pincus. Legal clinics now exist in almost every law school, providing effective legal services at the pretrial, trial and appellate level for tens of thousands of needy people each year. Often such clinics coordinate with *pro bono* work by practicing attorneys in private firms and by supervising professors. Increased recognition of the excellent and much-needed work that these programs do would be helpful. It might be useful for bar associations to recognize this work with certificates and occasional public displays of gratitude to honor representation by professors and students, which is the equivalent of many thousands of lawyer hours.

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<sup>232</sup>See, e.g., Betsy Rogers, *Alumni Profile: Kinshasa Williams*, WASH. U.L. MAG. (Wash U. L. Sch., St. Louis, Mo.), Summer 2007, at 14-15, available at <http://www.law.wustl.edu/alumni/magazine/summer2007/williamsprofile.pdf> (describing clinics for women); Timothy J. Fox, *Alumni Profile: John Kozyak*, WASH. U.L. MAG. (Wash U. L. Sch., St. Louis, Mo.), Summer 2007, at 16-17, available at <http://www.law.wustl.edu/alumni/magazine/summer2007/kozyakprofile.pdf> (describing clinics for the poor); *Liman at Ten: Liman Program Celebrates Its Tenth Anniversary and Looks Forward to Future Decades of Public Interest Lawyering*, ARTHUR LIMAN PROGRAM PUBLIC INTEREST NEWSLETTER (Yale L. Sch., New Haven, Ct.), Fall 2007, at 1, available at [http://www.law.yale.edu/documents/pdf/Intellectual\\_Life/2007\\_Liman\\_Newsletter.pdf](http://www.law.yale.edu/documents/pdf/Intellectual_Life/2007_Liman_Newsletter.pdf) (celebrating the tenth anniversary of Yale's clinical program); PUB. ADVOCACY CTR. BROCHURE (Touro L. Sch., Central Islip, N.Y.), 2007 (bringing together 15 public advocacy groups housed within the law school to interact with students and those in need of legal services, financed by William Randolph Hearst Foundation and the Horace and Amy Hagedorn Long Island Fund); Thomas Adcock, *Advocates for Vets: City Bar, Law Firms Join Forces to Launch Legal Clinics for Veterans*, N.Y.L.J., Oct. 26, 2007, at 24 (discussing Veterans Legal Clinic that offers training sessions for lawyers); Thomas Adcock, *Public Interest Projects*, N.Y.L.J., Oct. 19, 2007 at 24 (reporting that 40 pro bono attorneys met with Liberian refugees).

## Changes for the Future

Reforms and infusion of substantial resources are needed to ensure that every person has access to a capable and experienced attorney with the resources, time, and will to provide meaningful advice and representation. Our current system is a product of a history of benign neglect and inadequate funding. The British system may provide some lessons.<sup>233</sup> I remember the shock on the face of a citizen with a thick British accent who refused to sit on one of my juries because the plaintiff had no counsel and I could find none who would take her case.<sup>234</sup>

To encourage attorneys to provide effective representation, court-appointed attorneys in all courts should receive fees commensurate with the time and effort required. This should be on an hourly basis, equivalent to that of an assistant district attorney or federal defender salary and adjusted annually to account for inflation. It is desirable that attorneys in state courts receive the same level of compensation as federal CJA attorneys.

New York State, which so prides itself on due process and its extraordinary bar and academics, needs to again address this congeries of issues. Chief Judge Kaye's Commission on

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<sup>233</sup>See Rosalind Brooke, Lord Chancellor, *Report of the Advisory Committee on Legal Advice and Assistance*, 33 THE MOD. L. REV. 432 (1970); G. R. Thomson, *Legal Aid in Great Britain*, 3 THE WESTERN POL. QUART. 28 (1950); Robert Verkaik, *The Big Question: Are We Spending Too Much on Legal Aid, and Do the Right People Benefit?*, INDEP., Nov. 29, 2006, at 10; ROGER SMITH, JUSTICE, LEGAL AID IN ENGLAND AND WALES: A SHORT DESCRIPTION (2004).

<sup>234</sup>On another occasion, I appointed counsel for the plaintiff in a rather thin case. The winning defendant later sued the appointed counsel for \$100,000 in legal fees "caused by full discovery" in a case with little merit. Of course the claim was dismissed, but if an attorney is appointed in every case that is not dismissed at the outset, how can the attorney comply with ethical obligations without engaging in adequate discovery? How can cases be screened without the judge coming to a premature conclusion of no merit or merit?

the Future of Indigent Defense Services<sup>235</sup> is an excellent start, but it only addressed limited aspects of the criminal justice system. “In view of the growing gap between the wealthy and the poor in our City and State, and the rich legal resources we lay claim to, it [is] time to reexamine what we are and should be doing in the way of equalizing representation in our courts.”<sup>236</sup> A joint state-federal task force on representation of the poor and middle class should be established.<sup>237</sup> Attorneys are particularly needed now when such doctrines as standing, an issue to which I now turn, are increasingly used to keep litigants out of courts.

### Standing

The door to the Supreme Court is held open by the Constitution; Congress, in turn, is to a large extent keeper of the keys to the lower federal courts.<sup>238</sup> In the past half century, however, the courts have increasingly taken it upon themselves to close their doors to parties and complaints that they consider unsuitable for judicial resolution. One of the chief ways of petitioning for redress is through cases brought in our courts. Principal among the tools we use

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<sup>235</sup>COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 18, 2006).

<sup>236</sup>Letter from Jack B. Weinstein, Senior Judge, U.S. Dist. Court for the E. Dist. of New York, to Judith Kaye, Chief Judge, N.Y. Court of Appeals, (Oct. 9, 2007).

<sup>237</sup>Anthony Ramirez, *Suit by Civil Liberties Group Presses State on Legal Services for the Indigent*, N.Y. TIMES, Nov. 9, 2007, at B5; Joel Stashenko, *NYCLU Suit Seeks Reform of Defense for Indigent*, N.Y.L.J., Nov. 9, 2007 at 1.

<sup>238</sup>“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1; *see also id.* at art. I, § 8 (“The Congress shall have the Power . . . . To constitute Tribunals inferior to the supreme Court”).

in violation of the constitutional promise of the right to petition is the doctrine of standing.<sup>239</sup>

Expansion of this door-closing doctrine has the secondary effect of violating one of the essentials of our form of government: transparency, discussed below. If the people cannot discover what is going on in our government through litigation, how can they control officials? The result of the public's being informed of alleged torture by Americans, as Alfred McCoy points out, "was an epic political struggle and public discussion over the Constitution, civil liberties, and international law—a discussion marked by nuance, passion, and even, at times, erudition; and one with profound significance for the future of the Republic."<sup>240</sup>

Standing is not mentioned in our Constitution.<sup>241</sup> Its modern constitutional dimension is purportedly rooted in Article III's grant of jurisdiction to the federal courts over "cases" arising under federal law, and "controversies" arising between diverse parties.<sup>242</sup> For much of our

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<sup>239</sup>See U. S. Const. amend. I (forbidding Congress from limiting the right to petition "the Government for a redress of grievances.").

<sup>240</sup>ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* 150 (2006); see also, e.g., ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY* 106 ff. (2005).

<sup>241</sup>"Unlike 'case or controversy,' which can summon the express terms of Article III, 'standing' is not mentioned in the Constitution or the records of the several conventions . . . . '[S]tanding' was neither a term of art nor a familiar doctrine at the time the Constitution was adopted." Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 818 (1968).

<sup>242</sup>This is a simplification of Article III's grant of jurisdiction. The relevant clause reads in full:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to

nation's history, these terms were interpreted to impose upon those seeking redress the requirement that a plaintiff must have a cause of action in order for his or her grievance to be heard in federal court.<sup>243</sup> Such an understanding comports both with etymology and traditional understandings of the judicial power.<sup>244</sup>

The gravamen of modern standing doctrine is not the existence of a cause of action, but instead the suffering by the plaintiff of a "direct injury." This principle was first established by the Supreme Court less than a hundred years ago, in the case of *Frothingham v. Mellon*.<sup>245</sup>

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Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

<sup>243</sup>See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992) ("[T]here had always been a question whether the plaintiff had a cause of action, and this was indeed a matter having constitutional status. Without a cause of action, there was no case or controversy and hence no standing."); *id.* at 177 (examining early English and American legal practice and concluding that the "relevant practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit").

<sup>244</sup>As elaborated upon by one scholar, "[a]ttention to the etymological linkages between 'case' and 'cause' should help to remind us that a properly framed case in which a plaintiff has 'standing' is simply one in which she has a cause of action." Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 718 n.154 (1989). Professor Amar adds, "whether such a cause of action exists cannot be determined by staring at the words of article III; one must look outside that article to substantive constitutional, statutory, and common law norms." *Id.*; see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) ("[L]egal injury is by definition no more than the violation of a legal right; and Legal rights can be created by the legislature.").

<sup>245</sup>262 U.S. 447, 488 (1923). Professor Jaffe describes the "major premise" of *Frothingham* as follows: "[A] court is not competent to adjudicate the legality of the action of a coordinate branch unless the plaintiff is threatened with a 'direct injury' as distinguished from

There, the Court declined to entertain a suit by a taxpayer challenging as unconstitutional a federal appropriations act. The then 120-year-old duty of the courts to “say what the law is”<sup>246</sup> was newly interpreted to be limited to the following situations:

[W]hen the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon . . . an act [of Congress]. . . . The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.<sup>247</sup>

As the Supreme Court has counseled, “[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.”<sup>248</sup> Yet, nowhere in English common law

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what ‘he suffers in some indefinite way in common with people generally.’” See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1309 (1961). The newness of modern standing doctrine is evidenced by the fact that the word “standing” is never once mentioned in *Frothingham*, the case widely considered to be the doctrine’s progenitor.

<sup>246</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>247</sup>*Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

<sup>248</sup>*Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925). The Court goes on to explain the following:

The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

*Id.* at 109; see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962) (“[O]ne touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be

practice do the proponents of standing limits find support for the proposition that a plaintiff must show an actual or threatened direct personal injury in order to have his or her complaint heard in a court of law.<sup>249</sup> According to one scholar, “[w]hen we turn to pre-Constitution English law . . . we find that attacks by *strangers* on action in excess of jurisdiction occupied the courts in Westminster.”<sup>250</sup> A few examples suffice to illustrate this point:

1. The writ of prohibition allowed strangers to a pending action to complain that the court in that action was exceeding its jurisdiction, without any showing of personal injury or stake in the outcome.<sup>251</sup>

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maintained is of a sort recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems.”) (internal quotation marks omitted).

<sup>249</sup>The common law history—or more accurately, its lack—of the personal injury element of standing has been extensively evaluated in three excellent law review articles: Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170-73 (1992); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818-28 (1968); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-82 (1961).

<sup>250</sup>Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819 (1968) (emphasis added); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396-97 (1987) (“Prior to the Revolution, other writs as well as equity practices brought before the courts cases in which the plaintiff had no personal interest or ‘injury-in-fact.’ Under the English practice, ‘standingless’ suits against illegal governmental action could be brought via the prerogative writs of mandamus, prohibition, and certiorari issued by the King’s Bench.”).

<sup>251</sup>*See* 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797) (“[T]he kings courts that may award prohibitions, being informed either by the parties themselves, *or by any stranger*, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction)”) (emphasis added); *see also* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819-20 (1968). *But see* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 174 (1992) (“At the national level, there is no clear American tradition of reliance on the prerogative writs. According to the Supreme Court’s interpretation of the All Writs Act,

2. The writ of certiorari, requiring that the record of a proceeding be sent up to the King's Bench to have its legality examined, was available to both parties and strangers to the lower court proceedings.<sup>252</sup>
3. An information of quo warranto, brought to challenge the usurpation of a public franchise or corporate office,<sup>253</sup> was available to strangers unable to demonstrate personal injury.<sup>254</sup>

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Congress did not choose explicitly to create general mandamus, prohibition, or certiorari jurisdiction, though there were particular statutory and common law cases involving the writs, and it seems clear that their limited use was a matter of legislative discretion rather than constitutional command.” (citations omitted).

<sup>252</sup>See, e.g., *Regina v. Thames Magistrates Ct., ex parte Greenbaum Local Gov't Rep.* 129, 132, 135-36 (1957) (“[T]he remedy by certiorari . . . extends to any stranger”); H.W.R. WADE, *ADMINISTRATIVE LAW* 125-26 (2d ed. 1967) (“[A]n applicant for certiorari or prohibition does not have to show that some legal right of his is at stake. If the action is an excess or abuse of power, the court will quash it at the instance of a mere stranger . . . [T]hese remedies are not restricted by the notion of locus standi.”); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 820-22 (1968) (discussing the 1725 case of *Arthur v. Commissioners of Sewers*, 88 Eng. Rep. 237 (1725), and concluding “[t]hat certiorari was available to a stranger may be inferred [from *Arthur*,] which drew a distinction between a party aggrieved and one who comes as a mere stranger, for purposes of deciding whether issuance of the writ was discretionary or a matter of right”) (internal quotation marks omitted).

<sup>253</sup>See, e.g., *U.S. ex rel. State of Wisc. v. First Fed. Savings & Loan Ass'n*, 248 F.2d 804, 807 (7th Cir. 1957) (“The modern information in the nature of a quo warranto is an extraordinary remedy and has been defined as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user, or non-user, of a public office or corporate franchise . . . and while still retaining its criminal form, it has long since come to be regarded as in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights.”) (quoting JAMES L. HIGH, *A TREATISE ON EXTRAORDINARY LEGAL REMEDIES: EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION* 458 (2d ed. 1884)).

<sup>254</sup>See *Rex v. Speyer*, L.R. 1 K.B. 595, 613 (1916) (Lord Reading) (“[A] stranger to a suit can obtain prohibition . . . and I see no reason why he should not in a proper case obtain an information of quo warranto”); Raoul Berger, *Standing to Sue in Public Actions: Is It a*

English practice thus held true to Lincoln’s not-yet-formulated ideal of the courts as a part of a government of, by, and for the people—or, conversely, Lincoln’s formulation was true to the history of Anglo-American jurisprudence and the original understanding of our Constitution.<sup>255</sup> As Lord Justice Lush summarized, “[e]very subject has an interest in securing that public duties shall be exercised only by those competent to exercise them.”<sup>256</sup> The necessity and propriety of such a rule becomes even clearer in the context of a government “of” the people—where the people are not subjects, but instead sovereigns calling on their government officials for an explanation of their activities.

The traditional rule and understanding of the terms “case” and “controversy” held sway in American courts pre-*Frothingham*. As Professor Steven Winter has noted, “[a] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that

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*Constitutional Requirement?*, 78 YALE L.J. 816, 823 (1968).

<sup>255</sup>As Professor Berger concludes after a thorough review of English practice:

At the adoption of the Constitution, in sum, the English practice in prohibition, certiorari, quo warranto, and informers’ and relators’ actions encouraged strangers to attack *unauthorized action*. So far as the requirement of standing is used to describe the constitutional limitation on the jurisdiction of [the Supreme] Court to cases and controversies; so far as “case” and “controversy” and “judicial power” presuppose a historic content; and so far as the index of that content is the business of the . . . courts of Westminster when the Constitution was framed, the argument for a constitutional bar to strangers as complainants against unconstitutional action seems to me without foundation.

Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1968) (internal quotations marks omitted) (emphasis in original).

<sup>256</sup>*See* *Rex v. Speyer*, L.R. 1 K.B. 595, 628 (1916) (Lord Reading) (emphasis added).

standing is a component of the constitutional phrase ‘cases or controversies’ or that it is a prerequisite for seeking governmental compliance with the law.’<sup>257</sup> Upon completing an exhaustive study of American jurisprudence in the years between the Founding and *Frothingham*, Professor Cass Sunstein concluded:

In that period, there was no separate standing doctrine at all. No one believed the Constitution limited Congress’ power to confer a cause of action. Instead, what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit.

The notion of injury in fact did not appear in this period. The existence of a concrete, personal interest, or an injury in fact, was neither a necessary nor a sufficient condition for a legal proceeding. People with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, “standing” existed, entirely independently of “concrete interest” or “injury in fact.”

Implicit in these ideas was a particular understanding of the relationship between Article III and standing. If neither Congress nor the common law had conferred a right to sue, no case or controversy existed.<sup>258</sup>

A review of the early Congresses’ enactments confirms the view espoused by the Supreme Court’s opinions over the nation’s first 150 years that direct injury was not a necessary element of a “case” or “controversy.” In the 1790s, Congress passed a number of statutes with *qui tam* provisions which allowed any citizen to bring suit against offenders of federal criminal law.<sup>259</sup> Despite the fact that *qui tam* actions are prosecuted by individuals who are not

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<sup>257</sup>Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1987).

<sup>258</sup>Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170 (1992).

<sup>259</sup>*See, e.g.*, Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (statute criminalizing the importation of liquor without paying duties); Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (statute prohibiting trade with Indian tribes); Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (statute criminalizing noncompliance with postal requirements); Act of Mar. 22, 1794, ch. 11, §

threatened with direct injury, the Supreme Court has not found constitutional fault in them.<sup>260</sup>

Similarly, early Congresses authorized informers' actions, allowing any citizen to bring suit against a private individual or an executive official to enforce public duties.<sup>261</sup> In the analysis of the Supreme Court, "[s]tatutes providing for actions by a common informer, who himself has *no interest whatever in the controversy* other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."<sup>262</sup>

Even as he argued that the courts should require that litigants have a personal stake in the outcome of their suit before being allowed to prosecute it, Justice Harlan recognized that historical approval of *qui tam* and informer suits meant that such a rule could not claim constitutional imprimatur:

[F]ederal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." The various lines of authority are by no means free of difficulty, and certain of the cases may be explicable as involving a personal, if remote, economic interest, but I think that it is, nonetheless, clear that non-Hohfeldian plaintiffs as such are not *constitutionally* excluded from the federal courts.<sup>263</sup>

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2, 1 Stat. 347, 349 (statute criminalizing slave trade with foreign nations).

<sup>260</sup>U.S. *ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943) ("Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts.") (footnote omitted).

<sup>261</sup>*See, e.g.*, Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45; Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277-78. *See generally* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175-76 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406-09 (1987).

<sup>262</sup>*Marvin v. Trout*, 199 U.S. 212, 225 (1905) (emphasis added).

<sup>263</sup>*Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (internal citations

Constitutionality notwithstanding, Justice Harlan found “every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government.”<sup>264</sup> In *Flast v. Cohen*, the 1968 taxpayer standing case where Justice Harlan found himself in dissent, the Supreme Court began to shift away from the prevailing understanding of “cases” and “controversies” as delineating “questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,”<sup>265</sup> a view grounded in separation of powers principles: “those words [i.e., cases and controversies] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”<sup>266</sup>

It was perhaps a realization that the historical limitations on “cases” and “controversies” envisioned by Justice Frankfurter in the decades spanning *Frothingham* and *Flast* lacked a solid foundation<sup>267</sup> that led the Court to seek out a new constitutional basis for lack of standing as a

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omitted) (emphasis added).

<sup>264</sup>*Id.* at 130 (“Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority.”).

<sup>265</sup>*Id.* at 95.

<sup>266</sup>*Id.*

<sup>267</sup>*See, e.g.,* *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (“[T]he framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”); *see also* Joint Anti-Fascist Refugee

reason to deny access to the courts. Recognizing the “uncertain historical antecedents” of standing and other “justiciability” doctrines, the Court concluded that we must turn to “the implicit policies embodied in Article III, and not history alone,” to understand the jurisdictional limitations imposed by the terms “case” and “controversy.”<sup>268</sup> Unmoored from even the leaky buoy of historic precedent, the doctrine of standing took form as a creature of judicial discretion, guided only by the “implicit policies” the judiciary was able to divine from Article III.

As a basis for interpreting “cases” and “controversies” in a manner that excludes litigants from the federal courts, separation of powers is no more powerful than purported historical antecedents.

Judicial checks on legislative excesses represent a deliberate and considered departure from an abstractly perfect separation of powers, part of what Madison called a necessary “blending” of powers that was required to make the separation work. Litigation that challenges unconstitutional legislation does not constitute an ‘improper interference’ with nor an ‘intrusion’ into the legislative domain. No authority to make laws in excess of granted powers was “committed” to Congress; instead courts are, now at least, authorized to check Congressional excesses.<sup>269</sup>

Nonetheless, the constrained conception of the judicial role envisioned by the separation of powers rationale for a constitutional standing doctrine gained traction in the Supreme Court

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Committee v. McGrath, 341 U.S. 123, 150-57 (1951) (Frankfurter, J., concurring). *But see* above discussion examining the flimsiness of the historical basis for “direct injury” standing requirement; *Flast*, 392 U.S. at 95-96 (“Part of the difficulty in giving precise meaning and form to the concept of justiciability stems from the uncertain historical antecedents of the case-and-controversy doctrine.”).

<sup>268</sup>*Id.* at 96; *see also* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 828 (1968).

<sup>269</sup>*Id.* at 828-29 (footnotes and internal quotation marks omitted).

over the second half of the twentieth century.<sup>270</sup> This movement coincided with the Court’s elucidation of “standing” under the Administrative Procedure Act and within administrative law.<sup>271</sup> The central question animating the standing decisions of this era concerned the ability of

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<sup>270</sup>*See, e.g., Flast*, 392 U.S. at 95 (“[I]n part those words [case and controversy] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (1974) (“To permit a claimant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature . . .”); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74 (1982) (“Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (“[T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts . . . . One of [the] landmarks [of the judicial sphere], setting apart the ‘Cases’ and ‘Controversies’ that are of the justiciable sort referred to in Article III . . . is the doctrine of standing.”) (citation omitted). *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the principle of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”); *see also* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 15 (5th ed. Supp. 2007) (noting that *Kowalski v. Tesmer*, 543 U.S. 125 (2004) (6-3 decision), where lawyers challenged a Michigan state law changing appointment of appellate counsel from mandatory to discretionary, was a “clear departure from the Court’s usual apparent practice of upholding third-party standing in cases in which the underlying claim of third-party rights would appear to be substantively meritorious”).

<sup>271</sup>*See, e.g., Ass’n of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (“[T]he Administrative Procedure Act grants standing to a person aggrieved by agency action within the meaning of a relevant statute.”) (internal quotation marks and citation omitted); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (“[T]he ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”). *See generally* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988) (“The creation of a separately articulated and self-conscious law of standing can be traced to two overlapping developments in the last half-century: the growth of

citizens to challenge laxness within the executive branch's enforcement of congressional legislation.

In the 1960s and 1970s, observers of regulatory law claimed that congressional purposes could be undermined not merely by excessive regulation, but also by insufficient regulation or agency hostility to statutory programs. If conformity to law was a goal of administrative law, there was no reason to distinguish between the beneficiaries and the objects of regulation. Suits brought by beneficiaries might well serve to promote agency fidelity to legislative enactments.<sup>272</sup>

As evident in the 1970 decision *Association of Data Processing Organizations v. Camp*, the Supreme Court once favored a broad standing doctrine in line with “the trend . . . toward enlargement of the class of people who may protest administrative action.”<sup>273</sup> *Data Processing* introduced the term “injury in fact,”<sup>274</sup> which was later made part of the “irreducible constitutional minimum of standing.”<sup>275</sup> As Professor Sunstein put it, “[t]he *Data Processing*

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the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values.”); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819-20 (1968); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181-92 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 887-90 (1983).

<sup>272</sup>Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183 (1992); see also Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971) (“The decisions in *Data Processing* and *Arnold Tours* reflect, I think, the Supreme Court's feeling that the Comptroller of the Currency is too ‘bank-minded’ to enforce statutory limits on banking operations.”).

<sup>273</sup>*Data Processing*, 397 U.S. at 154; see also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 185 (1992) (“The [*Data Processing*] Court appeared fully to endorse the 1960s expansions in the legal interest test; under its new test, beneficiaries of regulatory programs would generally have standing.”).

<sup>274</sup>“One might well ask: What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes.” *Id.*

<sup>275</sup>See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (“Over the

Court appears to have thought that it was greatly simplifying matters by shifting from a complex inquiry of law (is there a legal injury?) to an exceedingly simple, law-free inquiry into fact (is there a factual harm?).<sup>276</sup>

Uncomfortable with the rising amount of public interest, and particularly environmental, litigation,<sup>277</sup> the courts soon began to shift to a view of standing that would limit the ability of prospective beneficiaries of administrative regulation to challenge agency action.<sup>278</sup> This trend

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years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ . . .”).

<sup>276</sup>Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 188 (1992). For an exploration of the fallacy of reasoning that the existence of an injury in fact can be determined without reference to legal principles, *see id.* at 188-92.

<sup>277</sup>*See, e.g.,* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983) (deriding “the judiciary’s long love affair with environmental litigation” that began in 1971).

<sup>278</sup>Professor Cass R. Sunstein suggests that the following constituencies underlie this trend:

Some observers, for example, think that government regulation of private ordering is constitutionally suspect. The academic enthusiasm for greater constitutional checks on the regulatory state has apparently found modest judicial support. Whether or not government regulation is unconstitutional, many people think that it is morally problematic, and perhaps this view too has support on the Supreme Court. Other people think that government regulation does not work in practice—that it produces high social costs for dubious benefits. This view has influenced the executive branch, and it has appeared to play a role in the courts as well. Many people think that administrators are systematically inclined toward overenforcement of regulatory statutes, or toward “capture” by regulatory beneficiaries. Quite apart from issues of substance, some urge that judicial compulsion of regulatory action is unconstitutional on Article II grounds or at least constitutionally troublesome. Others think that courts cannot possibly play a fruitful role in assuring adequate implementation of regulatory statutes. Some or all of these ideas undoubtedly help explain what has become an unmistakable trend in favor of greater judicial insistence on the distinction between suits by regulating beneficiaries

can be seen as a “modern theoretical rejoinder to the 1960s and 1970s fear of agency capture” by the regulated.<sup>279</sup> Added were two new essential elements to Article III’s “case” and “controversy” requirement—causation (or “traceability”)<sup>280</sup> and redressability—within the decade following *Data Processing*.<sup>281</sup> The sudden addition of these requirements, Justice Scalia has recognized, is a “sea-change that has occurred in the judicial attitude towards the doctrine of standing”<sup>282</sup> since *Marbury v. Madison*.<sup>283</sup> This development undermines the claim that there is

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and suits by regulated objects.

Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 196-97 (1992) (footnotes omitted).

<sup>279</sup>*Id.*

<sup>280</sup>“In the 1970s, the Burger Court added causation as an element of the threshold determination of standing. Professor Chayes has observed that any first year law student, at least after he has read the *Palsgraf* case, could predict what would happen when the metaphysically undisciplined concept of causation is introduced.” Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1379 (1987) (internal quotation marks omitted).

<sup>281</sup>See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-42 (1976) (discussing causation and redressability elements of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing causation and redressability as two of the three elements comprising the “irreducible constitutional minimum of standing”). See generally Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 185 (1980-81) (“One of the most controversial methods employed by the Burger Court to temper the expansion of standing under the broad injury-in-fact test has been the development of an autonomous doctrine of causation.”) (footnote omitted).

<sup>282</sup>Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882-83 (1983); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (“[T]he law of standing has been greatly changed in the last 10 years”).

<sup>283</sup>5 U.S. (1 Cranch) 137 (1803).

an “irreducible constitutional minimum of standing.”<sup>284</sup>

Causation and redressability—essentially “two facets of a single causation requirement”<sup>285</sup>—are not new criteria. They have traditionally formed part of a court’s inquiry into the merits of a suit.<sup>286</sup> As Justice Brennan observed, “the causation component of the Court’s standing inquiry is no more than a poor disguise for the Court’s view of the merits of the underlying claims.”<sup>287</sup>

What purpose is served by excluding plaintiffs whose claims appear, at the earliest

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<sup>284</sup>*Lujan*, 504 U.S. at 560 (Scalia, J.).

<sup>285</sup>CHARLES A. WRIGHT, *THE LAW OF THE FEDERAL COURTS* 68 n.43 (4th ed. 1983); *see also* *Allen v. Wright*, 453 U.S. 737, 758 n.19 (1984) (“To the extent that there is a difference [between traceability and redressability], it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.”).

<sup>286</sup>“In a tort claim, for example, the plaintiff must prove a causal connection between the injury and the wrongful act or omission. The plaintiff must, of course, plead that the wrongful act or omission caused the injury, but she need not allege specific facts at the pleading stage. If the plaintiff fails to allege causation properly, that defect can be attacked in a demurrer motion or motion for summary judgment. In any event, however, the issue of causation is decided on its merits. Judges and juries ask whether it is reasonable to expect the defendant to have exercised reasonable care with respect to the plaintiff, often with reference to community standards.” Kevin A. Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CAL. L. REV. 1061, 1089 (1988).

<sup>287</sup>*Allen v. Wright*, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting); *see also* Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 23 (“This ritual recitation [of the components of standing doctrine] having been performed, the Court then chooses up sides and decides the case.”). Including causation within the standing inquiry can lead to procedural incongruities: “[I]n recent cases the Court has required that causation be pleaded with particularity to establish standing. Yet no such particularity has been required in pleading the same causation on the merits of the claim.” Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) and *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976)).

stages of the proceedings, to be weak on the merits? Procedural devices including motions to dismiss and summary judgment already function—I would argue, too vigorously<sup>288</sup>—as screening devices for frivolous and improvable claims. One result of cloaking merits-based decisions as standing-based rulings is obfuscation of the laws controlling government action. The judiciary is able to avoid “say[ing] what the law is”<sup>289</sup> by preventing plaintiffs from petitioning for relief.<sup>290</sup> Professor Tushnet points out that “the causation doctrine . . . embroils the threshold standing determination too heavily in the merits and works to undermine the Court’s role in protecting individuals from harm resulting from illegal government activity.”<sup>291</sup>

The Court’s rationale for incorporating within the standing inquiry consideration of factors that go to the merits of a claim is the need to defend the separation of powers doctrine. “[C]ausation’ in [the standing] context is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental

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<sup>288</sup>See *infra* text discussing extensive use of summary judgment to take cases out of the hands of juries; see also Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

<sup>289</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 177 (1803).

<sup>290</sup>See, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 683-84 (1977) (discussing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)) (“Without acknowledging that it was ruling on the merits, the Court plainly held that plaintiffs had failed to make out a case of ‘primary’ or ‘marginal’ causation. That may indeed have been the correct result on the merits, but instead of directly confronting the statutory tax issue, the Court concealed its decision by raising constitutional standing questions.”) (footnote omitted).

<sup>291</sup>See *id.* at 664 (“[B]y refusing to confront hard cases honestly, the Court has failed in its task of judicial review.”).

structure.”<sup>292</sup>

The simplest retort to this thesis is Justice Douglas’s: “[T]he role of the federal courts is not only to serve as referee between the States and the center [or between the three branches of the central government], but also to *protect the individual* against prohibited conduct by the other two branches of the Federal Government.”<sup>293</sup> As Chief Justice Marshall established in *Marbury*, it is the province of the courts to “decide on the rights of individuals.”<sup>294</sup>

The separation of powers based applications of the causation elements of standing have, in practice, served largely to enhance executive freedom from control within our tripartite constitutional system. “[M]ost of the key cases [where the Court has found the causation and redressability requirements of standing to be lacking] have involved attempts by some plaintiff to require the executive branch to fulfill its statutory responsibilities by enforcing the law more vigorously.”<sup>295</sup>

Justice Scalia defends this framework by finding within the constitutional clause

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<sup>292</sup>*Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 801 (D.C. Cir. 1987).

<sup>293</sup>*Flast*, 392 U.S. at 110 (Douglas, J., concurring) (emphasis added).

<sup>294</sup>*Marbury*, 5 U.S. (1 Cranch) at 170.

<sup>295</sup>Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 193-94 (1992); see, e.g., *Linda R.S.*, 410 U.S. at 617-19 (holding causation element of standing was lacking in suit by mother against district attorney contending that his refusal to initiate child support proceedings against her child’s father—based on prosecutor’s unconstitutional interpretation of state statute as excluding illegitimate children—caused her harm); *Simon*, 426 U.S. at 41-44 (holding causation element of standing was lacking in suit contending that new IRS policy reducing the obligation of hospitals to provide emergency care to the indigent violated the Internal Revenue Code because, though plaintiffs could show they had been denied medical services based on their indigency, they could not sufficiently demonstrate the link between the new policy and the denial of services).

requiring the Executive to “take Care that the Laws be faithfully executed”<sup>296</sup> the right of the Executive to not enforce the laws at all: “The ability to lose or misdirect laws can be said to be one of the prime engines of social change.”<sup>297</sup> This kingly view of the chief executive has some limited support in the United States Attorney’s power to decline jurisdiction or arrange for plea deals. But this kind of limited pragmatic choice is different from flouting congressional policy. Dubiosity envelops this view of Justice Scalia. Consider the case of *Linda R.S. vs. Richard D.*, where a mother brought suit against a local district attorney contending that his refusal to initiate child support proceedings against her child’s father—based on the prosecutor’s unconstitutional interpretation of a state child support statute as excluding “illegitimate” children—caused her harm.<sup>298</sup> If the Court believed that the district attorney possessed the power to enforce the law in a manner that discriminated against a protected group, or if it believed itself powerless to compel him to correct that constitutional violation, or even if it believed there was no constitutional violation at all, it should have been required to state and explain as much.<sup>299</sup> Instead, the doctrine of standing permitted the Court to abdicate its role in reviewing the merits of plaintiff’s claim.<sup>300</sup>

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<sup>296</sup>U.S. CONST. art. II, § 3.

<sup>297</sup>Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

<sup>298</sup>*Linda R.S. v. Richard D.*, 410 U.S. 614, 617-19 (1973).

<sup>299</sup>*Cf. Marbury*, 5 U.S. at 167 (“So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally *a question examinable in a court*, and the decision of the court upon it must depend on the opinion entertained of his appointment.”) (emphasis added).

<sup>300</sup>*Linda R.S.*, 410 U.S. at 617-19 (“To be sure, appellant no doubt suffered an injury

*Marbury* supports the proposition that plaintiffs seeking to compel the executive branch to enforce the laws should have their day in court. “[W]here a specific duty is assigned [to the executive branch] by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”<sup>301</sup> Should the courts find the individual’s rights have not been violated, or that the violation is not remediable, these reasons for decisions on the merits of the individual’s claim should be stated.

Thus far my discussion has focused on the doctrine of standing’s newly minted<sup>302</sup>

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from the failure of her child’s father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement . . . . [I]nquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is the proper and appropriate party to invoke federal judicial power.” (quotation omitted).

<sup>301</sup>*Marbury*, 5 U.S. at 166.

<sup>302</sup>That constitutional standing doctrine is of recent vintage is generally conceded. *See, e.g.,* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374-78 (1987) (arguing that “the modern doctrine of standing is a distinctly twentieth century product”); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1968) (“[Standing] is a judicial construct pure and simple which, in its present sophisticated form, is of relatively recent origin.”) (footnote omitted). Writing in 1992, Professor Sunstein illuminated the doctrine’s remarkable modern trajectory:

In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 . . . . Of those 117, 71, or over two thirds, of the discussions occurred after 1980 . . . . Of those 117, 109, or nearly all, of the discussions occurred since 1965. The first reference to “standing” as an Article III limitation can be found in *Stark v. Wickard*, decided in 1944. The next reference does not appear until eight years later, in *Adler v. Board of Education*. Not until the *Data Processing* case in 1970 did a large number of cases emerge on the issue of standing. The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon.

constitutional elements. There is insufficient reason here to delve fully into what the Court has termed standing’s “prudential” elements, comprised of “judicially self-imposed limits on the exercise of federal jurisdiction.”<sup>303</sup> The three most frequently invoked prudential standing limits are a ban on third party standing, a ban on the presentation of “generalized grievances,” and the requirement that plaintiff’s complaint fall within the “zone of interests” of the law she invokes.<sup>304</sup> The most important aspects of these requirements for our purposes is that they are concededly wholly judge-made, and limited only by judicial discretion—or judicial fiat.<sup>305</sup>

As the Supreme Court has cautioned, “[t]he hydraulic pressure inherent within each of the separate Branches [of the federal government] to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”<sup>306</sup> Judicial usurpation of the power to control the jurisdiction of the federal courts—entrusted to Congress in Article I, Section 8 of our Constitution (“To constitute Tribunals inferior to the supreme Court”)—represents an insidious

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Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169 (1992) (footnotes omitted). *But see id.* at 170 (“[A] handful of cases in the 1920s and 1930s relied on notions of ‘standing’ without mentioning the word”).

<sup>303</sup>Allen v. Wright, 453 U.S. 737, 751 (1984).

<sup>304</sup>Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11-12 (2004).

<sup>305</sup>See, e.g., Warth v. Seldin, 422 U.S. 490, 500 (1975) (describing prudential standing limits as “essentially matters of judicial self-governance”). The source of the courts’ authority to fashion prudential standing rules has never been identified. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (“Personally, I find this bifurcation [between constitutional and prudential standing limits] unsatisfying—not least because it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”).

<sup>306</sup>I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

type of aggrandizement. First, by limiting the right of individuals to seek review of governmental action, it undermines the foundation of our people's government. Second, unlike aggrandizement by Congress or the Executive, appropriation of power by the Judiciary has no effective check.

Standing has “been called one of the most amorphous concepts in the entire domain of public law.”<sup>307</sup> The very vagueness of modern standing doctrine itself imposes a hurdle on the path of public access to the courts.<sup>308</sup> “Confusion twice-confounded reigns in the area of federal jurisdiction described as ‘standing to sue.’”<sup>309</sup> Doctrinal instability allows the courts to retain an element of unrestrained discretion in this area of law; soft edges have the advantage of being easy to reshape.<sup>310</sup> As the Supreme Court itself noted, “[t]he many subtle pressures which cause

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<sup>307</sup>*Flast*, 392 U.S. at 99 (quoting Hearings on S. 2097 before the Subcom. on Const. Rights of the Senate Jud. Cmte., 89th Cong., 2d Sess., 465, 493 (1966) (statement of Prof. Paul A. Freund)); see also Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (“[T]he law of standing lacks a rational conceptual framework. It is little more than a set of disjointed rules dealing with a common subject.”).

<sup>308</sup>See, e.g., *Flast*, 392 U.S. at 95 (“Justiciability is itself a concept of uncertain meaning and scope.”); *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (“Justiciability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . .”).

<sup>309</sup>Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1968).

<sup>310</sup>See, e.g., See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1301-02 (1961) (“[T]he Court, wittingly or not, has allowed instances of intervention to accumulate which make abstentions based solely on the ground of standing arbitrary and unpersuasive”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373 (1987) (“Despite the purported constitutional warrant and the seeming clarity of the new black letter, standing law remains largely intractable.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1989) (describing “the apparently lawlessness of many standing cases”).

For example, despite its prolonged insistence that the prudential bar on third-party

policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.”<sup>311</sup>

Criticizing the standing doctrine, Justice Douglas declared:

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of the people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, *it is abdication for the courts to close their doors.*<sup>312</sup>

Though standing is, as already pointed out, a relatively recent tool designed to keep people from challenging governmental activity,<sup>313</sup> it is growing in strength. The most recent troubling example is *Hein, Director, White House Office of Faith-Based and Community Initiatives v. Freedom from Religion Foundation, Inc.*,<sup>314</sup>—a five-to-four decision regarding a claimed violation of the First Amendment’s separation of church and state. By executive order,

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standing is an essential tool of “judicial self-governance,” the Court has been willing to ignore it in certain—undefined and uncircumscribed—situations. “In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff’s claim rests on the legal rights of third parties.” *Warth*, 422 U.S. at 500-01.

<sup>311</sup>*Flast*, 392 U.S. at 97 (quotation omitted).

<sup>312</sup>*Id.* at 111 (Douglas, J., concurring) (emphasis added).

<sup>313</sup>*Cf.* SHARON BARAK, *THE JUDGE IN A DEMOCRACY*, chap. 8, “Non-Justiciability, or Political Questions” 177 (2006) (“The more non-justiciability is expanded, the less opportunity judges have for bridging the gap between law and society and for protecting the constitution and democracy. Given these consequences, I regard the doctrine of non-justiciability or ‘political questions’ with considerable wariness.”).

<sup>314</sup>127 S. Ct. 253 (2007); *see* Pamela A. MacLean, ‘Hein’ Alters Tactics in Faith Cases, *Without Taxpayer Standing to Sue over Some Grants to Faith-Based Groups, Plaintiffs Get Creative*, NAT’L L.J., Oct. 15, 2007, at S1 (2006 figures indicate \$2.16 million to be awarded by 11 federal agencies to religiously oriented groups in 130 programs).

the President had created a White House office and several centers within federal agencies to ensure that faith-based community groups are eligible to compete for federal financial support. No congressional legislation specifically authorized these entities, which were created entirely within the Executive Branch. Congress had not enacted any law specifically appropriating money to their activities, which were being paid for through general Executive Branch appropriations.

Respondents, an organization opposed to Government endorsement of religion and three of its members, sued alleging that the federal office directors violated the Establishment Clause by organizing conferences that were designed to promote, and had the effect of promoting, religious community groups over secular ones. The asserted basis for standing was that the individual respondents were federal taxpayers opposed to Executive Branch use of congressional appropriations for these conferences. The district court dismissed the claims for lack of standing, distinguishing *Flast v. Cohen*.<sup>315</sup> Because the officials acted on the President's behalf and were not charged with administering a congressional program, the court held that the challenged activities did not authorize taxpayer standing under *Flast*. The Court of Appeals for the Seventh Circuit reversed, reading *Flast* as granting federal taxpayers standing to challenge Executive Branch programs on Establishment Clause grounds so long as the activities are financed by a congressional appropriation, even where there is no statutory program and the funds are from appropriations for general administrative expenses. According to the intermediate court, a taxpayer has standing to challenge anything done by a federal agency so long as the marginal or incremental cost to the public of the alleged Establishment Clause

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<sup>315</sup>392 U.S. 83 (1968).

violation is greater than zero. The Supreme Court reversed in an opinion by Justice Alito, with four judges dissenting.

### Political Question

Even in the situation where a case meets the requirements of “justiciability” imposed by modern doctrines such as standing, courts may, they believe, nonetheless decline to decide it on the grounds that the suit presents a “political question.” The political question doctrine’s auspicious origins lay in Chief Justice Marshall’s opinion in *Marbury*:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . . The subjects are political. They respect the nation, *not individual rights*, and being entrusted to the executive, the decision of the executive is conclusive . . . . The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, of executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are the constitution and laws, submitted to the executive, can never be made in this court.<sup>316</sup>

The doctrine has expanded with time; political questions are defined much more broadly today than they were in *Marbury*. As of 1962, the doctrine’s contours were described by the Supreme Court as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>317</sup>

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<sup>316</sup>5 U.S. (1 Cranch) 137, 165-70 (1803) (emphasis added).

<sup>317</sup>*Baker v. Carr*, 369 U.S. 186, 217 (1962).

Discretion abounds.<sup>318</sup> Judges are left with the broad power to throw up their hands at a wide variety of difficult cases; the people are locked out. *Marbury* laid out a limited political question doctrine in which claims involving individual rights were excepted from the definition: “‘Political questions’ respect the nation, not individual rights . . . .”<sup>319</sup> As it evolved, the modern doctrine came to include questions incompatible with the *Marbury* formulation, including instances where individuals alleged the violation of specific constitutional principles and the existence of concrete injury.<sup>320</sup>

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<sup>318</sup>See, e.g., Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924) (“[T]he chaos that exists in the cases with reference to what are and what are not political questions defies classification . . . . To what matters does the term apply? It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction.”); Michael E. Tigar, *Judicial Power: The ‘Political Question Doctrine’ and Foreign Relations*, 17 UCLA L. REV. 1135, 1135 (1970) (“There is, properly speaking, no such thing [as a ‘political question doctrine’]. Rather, there are a cluster of disparate rules and principles any of which may, in a given case, dictate a result on the merits, lead to a dismissal for want of article three jurisdiction, prevent a party from airing an issue the favorable resolution of which might terminate the litigation in his favor, or authorize a federal court in its discretion and as a matter of prudence to decline jurisdiction to hear a case or decide an issue.”).

<sup>319</sup>*Marbury*, 5 U.S. at 166.

<sup>320</sup>See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (determining nonjusticiable a suit brought under the republican form of government clause, U.S. CONST. art. IV, § 4, even though the effect was to leave people in jail who were contesting the constitutionality of their conviction); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (3d Cir. 1973) (declaring challenge to Vietnam War to present a nonjusticiable political question despite fact that the rights of service personnel about to be sent overseas were implicated). *But see* Louis Henkin, *Is There a ‘Political Question’ Doctrine?*, 85 YALE L.J. 597, 608 (1976) (“The Court [in *Luther*] was not refusing to scrutinize the constitutionality of what the political branches had done. To the contrary, it found that the actions of Congress and the President in this case were within their constitutional authority and did not violate any prescribed limits or prohibitions. They were therefore law for the courts and there could be no basis for any court to disregard them.”). See also Mario M. Cuomo & Alfred W. Blumrosen, *The Illegal War*, N.Y.L.J., Aug. 9, 2007, at 3 (“[R]efusal by lower federal courts to intervene because the war power issues are considered to

Mindful of the courts' and Lincoln's goal—governing of, by, and for the people—judges must be careful not to dismiss as political those cases which implicate the rights of individuals. Recently, I decided a suit brought by Vietnamese nationals against manufacturers of Agent Orange and other herbicides for harms allegedly done to them and their land by the United States' use of the herbicides during the Vietnam War.<sup>321</sup> Defendants argued that the case presented a nonjusticiable political question because it implicated foreign relations and required the evaluation of the President's conduct during wartime. That argument was rejected:

The question at issue in the instant case is whether American corporations acted in violation of international law during a war. Defendants argue that this will require an assessment of the President's conduct during a time of war, and that courts lack the authority to ever determine whether the President, as Commander-in-Chief, has exceeded his constitutional authority. This kind of determination is one of substantive international law, not policy. A categorical rule of non-justiciability because of possible interference with executive power, even in times of war, has never existed.<sup>322</sup>

The case was dismissed on the merits. On appeal, the federal government as amicus argued that the merits should never have been considered because the suit, in which individuals alleged they were harmed as a result of conduct violative of international law, posed solely political questions inappropriate for judicial resolution. It is difficult to envision any conception of the proper judicial rule that contains such a large carve-out—i.e., any cases touching on

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be 'political' in nature produces an absurd result."); *Onesimpleloan v. U.S. Secretary of Educ.*, 496 F.3d 197 (2d Cir. 2007) ("enrolled bill rule" requires dismissal before assessment of standing).

<sup>321</sup>*In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

<sup>322</sup>*Id.* at 71 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 62 (2d ed. 1996) ("Of course the President cannot do what is forbidden to him . . . .")).

foreign relations or involving government conduct during wartime—in the individual rights universe which courts are called upon to protect. “The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does.”<sup>323</sup>

### Abstention

Abstention, like the judge-made doctrines of standing and political question, allows the courts to keep litigants out. It is an exception to a federal court’s duty to exercise jurisdiction over the claims of individuals whose cases are properly before them.<sup>324</sup> First propounded in the 1941 case of *Railroad Commission of Texas v. Pullman Co.*,<sup>325</sup> abstention permits a federal court to refuse to rule in favor of state court adjudication.<sup>326</sup> By affording state courts the opportunity to resolve important questions implicating state public policy without interference from federal courts, abstention comports with the notions of federalism and comity. It is, in my opinion, sometimes the least objectionable door-closing doctrine, even though it denies individuals with bona fide federal claims their right to be heard in federal court.

Broadly stated, the doctrine of abstention can be divided into four main categories:<sup>327</sup> 1)

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<sup>323</sup>Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

<sup>324</sup>*Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

<sup>325</sup>*Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941).

<sup>326</sup>ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 685 (2d ed. 1994).

<sup>327</sup>*In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996); see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 685-778 (2d ed. 1994).

abstention where a state court’s interpretation of an unsettled state law may avoid the need to resolve a federal constitutional issue (“*Pullman* abstention”);<sup>328</sup> 2) abstention to defer to a state court where complex local regulation and administration or important matters of public policy are implicated (“*Burford* abstention”);<sup>329</sup> 3) abstention where a federal suit would disrupt a pending state litigation implicating important state interests (“*Younger* abstention”);<sup>330</sup> and 4) abstention to conserve judicial resources where there is concurrent state-court litigation (“*Colorado River* abstention”).<sup>331</sup>

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<sup>328</sup>*Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 498 (1941) (holding that since it was unclear whether Texas Railroad Commission had authority under state law to issue a rule requiring White conductors to be present on all trains with sleeper cars, resolving this issue of state law could potentially “terminate the controversy” without any need to consider the Black porters’ federal constitutional claim that the rule violated their Fourteenth Amendment rights to equal protection and due process).

<sup>329</sup>*Burford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943) (emphasizing the complexity of the state-wide oil drilling scheme at issue in that case and holding that abstention was appropriate to prevent federal judicial interference where “the state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts”); *see also* *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-30 (1959) (upholding abstention by the district court, sitting in diversity, so that the state court could resolve an unsettled area of state law particularly sensitive to the state’s “sovereign prerogative”—in that case, whether state law permitted the city to use eminent domain—out of “regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State”).

<sup>330</sup>*Younger v. Harris*, 401 U.S. 37 (1971) (holding that the district court erred by enjoining the State’s District Attorney from prosecuting a defendant under a state law that the defendant alleged was unconstitutional). The *Younger* holding has been extended in subsequent cases to bar federal courts from issuing injunctions in state criminal, civil, and even administrative cases when there are important state interests at stake. *See* *Ohio Civil Rights Comm’n v. Dayton Christian Schs.*, 477 U.S. 619 (1986); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 720 (4th ed. 2003).

<sup>331</sup>*Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976) (holding that federal courts may stay their proceedings pending resolution of ongoing litigation

Abstention has advantages. First, by refraining from hearing cases where state law is uncertain, complex, or of extreme importance to the state, federal courts avoid “needless friction with state policies.”<sup>332</sup>

Second, abstention is consistent with federalism since it promotes states’ rights and gives state courts the opportunity to clarify unsettled state law, especially in cases where there are important or complex state public policies at stake. Abstention may enhance the legitimacy of both state and federal courts by not resolving state law issues on which federal courts do not have the final say, and “which may be displaced tomorrow by a state adjudication.”<sup>333</sup>

Third, federal courts can reduce unnecessary duplication of efforts, “giving regard to the conservation of judicial resources and comprehensive disposition of litigation.”<sup>334</sup> This justification for abstention is warranted where state-court adjudication might make adjudication of federal constitutional issues moot, as in *Pullman* abstention, saving the parties’ and the court’s time and resources. Where the concern is merely the “conservation of judicial resources,”<sup>335</sup> as in *Colorado River* abstention, courts should invoke abstention only in

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in state court out of concern for “[wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,” but limiting this type of abstention to “exceptional circumstances”).

<sup>332</sup>*Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (noting a “longstanding public policy against federal court interference with state court proceedings” rooted in the notions of “comity” and “Our Federalism”).

<sup>333</sup>*Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941).

<sup>334</sup>*Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

<sup>335</sup>*Id.*

“exceptional circumstances.”<sup>336</sup>

Despite the benefits, I have serious reservations about the abstention doctrines and would advocate their use only in “rare cases.”<sup>337</sup> They deprive litigants of their day in a court of their choosing. In diversity cases abstention undermines an underlying purpose of that form of jurisdiction: to provide a neutral forum for the determination of state law issues.

Denying the plaintiff a federal forum also can have severe consequences where federal constitutional rights are at issue and a state court may not be impartial. The result of *Younger* abstention is that the underlying federal claims are tried in state court, which sometimes can be problematic, especially in civil rights cases.<sup>338</sup> The result of *Pullman* abstention is that the federal constitutional issue may be avoided altogether if a litigant so chooses.<sup>339</sup> There is a risk of federal courts using abstention to duck difficult federal questions, thereby depriving litigants

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<sup>336</sup>*Id.* at 818-20.

<sup>337</sup>*Nicholson v. Williams*, 203 F. Supp. 2d 153, 197 (E.D.N.Y. 2002).

<sup>338</sup>See Bryce M. Baird, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 503 (1994) (arguing that the Supreme Court has expanded *Younger* abstention by creating “a new doctrine of ‘civil rights’ abstention . . . [ which] exclude[s] civil rights litigants from the federal forum which Congress and the courts have expressly guaranteed to such plaintiffs”); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 (1984) (discussing the use of *Younger* abstention in civil rights cases to “effectively prohibit the federal courts from enforcing federal civil rights laws, in particular section 1983, and from exercising their congressionally-vested jurisdiction to enforce those laws”).

<sup>339</sup>See *Harrison v. NAACP*, 360 U.S. 167, 177 (1959) (applying *Pullman* abstention in a civil rights case where an individual sued to enjoin a state officer from enforcing ambiguous state law on constitutional grounds). *But see* *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 419, 421 (1964) (holding that parties may choose to litigate their federal constitutional claims in state court and thereby relinquish the right to return to federal court, but that the right will be preserved if a party expressly reserves the right to return to federal court or the court finds that the party did not clearly relinquish this right).

of an appropriate judicial forum for claimed violations of their federal rights.

By going out of their way to avoid “friction with state policies,” federal courts may violate fundamental tenets of the federal system. When federal courts with statutory jurisdiction refrain from adjudication, they violate the constitutionally mandated separation of powers by usurping congressional authority to determine federal jurisdiction.<sup>340</sup> While the judiciary may invalidate laws that are unconstitutional, judges may not ignore laws that they find unwise or inconvenient.<sup>341</sup> As Chief Justice Marshall correctly observed, “[w]e have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”<sup>342</sup>

It should not be assumed that federal judges are not qualified to decide state law issues. Federal judges are experienced interpreters of state law; many had their start in state court, as lawyers or judges or both.<sup>343</sup>

Abstention also can create unnecessary delay, causing the parties more harm and

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<sup>340</sup>David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 543-45, 574-75 (1985).

<sup>341</sup>See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (“In our form of constitutional democracy, we have chosen to vest in a largely unrepresentative judiciary the power to invalidate laws adopted by a majoritarian legislature when those laws are deemed to violate constitutional protections. It has never been suggested, however, that the judiciary may openly ignore a legislative judgment on any grounds other than unconstitutionality”).

<sup>342</sup>*Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821); see also Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 71 (1984) (“The federal courts have assumed this authority, even in the absence of legislative history or statutory language authorizing such a refusal to act.”).

<sup>343</sup>*Id.* at 92.

increasing the total cost of litigation. By abstaining, a federal court may delay justice by several years.<sup>344</sup> The increased costs from protracted litigation may deprive a litigant of justice.<sup>345</sup>

While *Pullman* abstention permits a plaintiff to reserve the right to return to federal court to adjudicate his federal constitutional claims under the “*England* procedure,”<sup>346</sup> this bouncing back and forth may cause further delay and harm to the litigants.<sup>347</sup>

Despite my disquiet, I have relied on the abstention doctrine to dismiss or stay cases when doing so would promote comity and federalism while the plaintiffs were afforded the opportunity to fully and conveniently present their claims in state court. In *Berman Enterprises, Inc. v. Jorling*, for example, I dismissed the plaintiffs’ federal claims on a number of grounds, including *Burford* and *Pullman* abstention.<sup>348</sup> The plaintiffs were petroleum transportation businesses whose operations were suspended under a New York environmental statute

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<sup>344</sup>See CHARLES ALAN WRIGHT ET AL., LAW OF FEDERAL COURTS 52, 325 (6th ed. 2002) (noting that it can take many years for a case to move from federal court, to state court, and back to federal court for a final decision and citing *Spector Motor Serv. v. O’Connor*, 340 U.S. 602 (1951) (taking seven years to decide); *England v. La. State Bd. of Med. Examiners*, 384 U.S. 885 (1966) (nine years); *United States v. Leiter Minerals, Inc.*, 381 U.S. 413 (1965) (dismissing the case as moot eight years after abstention ordered)).

<sup>345</sup>Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1058 (1994) (“The delay also increases the expense of challenging the conduct, with litigants generally bearing their own costs.”).

<sup>346</sup>See *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 421 (1964); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 786-787 (4th ed. 2003).

<sup>347</sup>Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 90 (1984).

<sup>348</sup>*Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992), *aff’d*, 3 F.3d 602 (2d Cir. 1993).

following an oil spill.<sup>349</sup> Given the complex state statutory and administrative scheme for coping with the pollution of New York’s waterways, *Burford* abstention seemed appropriate.<sup>350</sup> By deciding the “unresolved and difficult questions of state law,” the state court could avoid the federal constitutional questions altogether, warranting abstention under *Pullman*.<sup>351</sup> Had the federal district court decided the state issues, it is not unlikely that the Court of Appeals for the Second Circuit would have certified the state issues to the New York State Court of Appeals. *Berman* illustrates the utility of the abstention doctrine where a complex unfolding state policy is central to a dispute and the litigants’ rights will be properly addressed in state court.

*Findley v. Falise* was another case in which I found abstention appropriate. In that case, plaintiffs brought a class action suit seeking damages for personal injuries resulting from alleged asbestos exposure.<sup>352</sup> Although I certified the class and approved the settlement, I abstained from deciding an issue regarding Maryland law because that law was unclear.<sup>353</sup> Since potentially hundreds of state claims were involved and I had no power to certify to the State’s highest court, I preferred to defer the issue to the Maryland courts “to resolve, either on a case-by-case basis, by some form of declaratory judgment, or by amendment to Maryland statutes.”<sup>354</sup>

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<sup>349</sup>*Id.* at 410.

<sup>350</sup>*Id.* at 413.

<sup>351</sup>*Id.* at 414.

<sup>352</sup>*Findley v. Falise (In re Joint E. & S. Dist. Asbestos Litig.)*, 878 F. Supp. 473, 479 (E. & S.D.N.Y. 1995).

<sup>353</sup>*Id.* at 556.

<sup>354</sup>*Id.* The Court of Appeals for the Second Circuit reversed my decision to abstain, arguing that the state interest at stake was not sufficiently important to “transcend that of any

In *NAACP v. A.A. Arms, Inc.*, however, I denied the defendants’ request that I abstain because abstention would have resulted in “senseless piecemeal and prolonged litigation” where the New York courts had provided adequate legal guidance on public nuisance law in guns litigation.<sup>355</sup> The federal complaints were filed well before any state action was brought. Waiting for the state action to reach trial stage would merely waste time and federal and state judicial resources, as well as those of the parties, their counsel and experts.<sup>356</sup>

In recent years, the Supreme Court has expressed a strong preference for federal courts to certify specific state law issues to state court rather than abstain from adjudication altogether.<sup>357</sup> As of 1995, forty-five jurisdictions, including New York, had enacted constitutional amendments or statutes permitting federal courts to certify questions of state law to the state’s highest court for resolution.<sup>358</sup> In *Arizonans for Official English v. Arizona*, the Supreme Court explained that the “[c]ertification procedure, in contrast [to abstention], allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an

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given asbestos-related settlement.” *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 776 (2d Cir. 1996), *aff’g in part and vacating in part*, Findley v. Falise (*In re Joint E. & S. Dist. Asbestos Litig.*), 878 F. Supp. 473 (E. & S.D.N.Y. 1995).

<sup>355</sup>*NAACP v. A.A. Arms, Inc.*, No. 99-3999 & No. 99-7037, 2003 U.S. Dist. LEXIS 3377, at \*20-21 (E.D.N.Y. Feb. 24, 2003).

<sup>356</sup>*Id.* at \*21.

<sup>357</sup>ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 789 (4th ed. 2003); *see* *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (noting that certification saves “time, energy, and resources and helps build a cooperative judicial federalism”).

<sup>358</sup>ERWIN CHEMERINSKY *FEDERAL JURISDICTION* 789 (4th ed. 2003). In most of these states, federal district courts also may certify questions to the highest state court. *Id.* at 790.

authoritative response.”<sup>359</sup> Certification may avoid the delays involved in abstention while also meeting the need to reduce friction with state courts over important or unsettled areas of state law.

In *Nicholson v. Williams*, a case involving a state child protective services policy to remove children from mothers who were being physically abused by their male partners, I found that any delay would be unacceptable and granted plaintiffs a preliminary injunction preventing the City of New York from unnecessarily removing children from their battered mothers.<sup>360</sup> Notwithstanding defendants’ request that I abstain, I found that the inevitable delay before the state court could resolve the issue would unnecessarily and irreversibly deprive many mothers and children of their constitutional rights.<sup>361</sup> Instead of reaching the constitutional issues, however, the Court of Appeals for the Second Circuit certified critical questions to the New York Court of Appeals for resolution, an option which is not available to federal district courts in New York.<sup>362</sup> The decision of the Court of Appeals for the Second Circuit to certify had much the same effect as *Pullman* abstention in that “an interpretation by the New York Court of Appeals . . . [could] avoid or significantly alter the substantial constitutional questions presented in this appeal.”<sup>363</sup> Yet, while the case was wending its way through the appellate process, my

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<sup>359</sup>*Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

<sup>360</sup>*Nicholson v. Williams*, 203 F. Supp. 2d 153, 258 (E.D.N.Y. 2002).

<sup>361</sup>*Id.* at 199.

<sup>362</sup>*Nicholson v. Williams*, 344 F.3d 154, 176 (2d Cir. 2003); *see* 2D CIR. § 0.27 (“[T]his Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court.”).

<sup>363</sup>*Nicholson v. Williams*, 344 F.3d 154, 176 (2d Cir. 2003).

protective stay remained in effect. The New York Court of Appeals answered the certified questions,<sup>364</sup> interpreting the state statute in keeping with the United States Constitution, thereby avoiding the constitutional issues raised in the initial complaint. The result was that the parties promptly settled. Emergency removals of children due to domestic violence against their mother are now more closely scrutinized.<sup>365</sup>

Abstention and certification to the state high court provide practical alternatives to federal court adjudication when important or complex state law is also at issue in a case. So long as state courts can properly and fully adjudicate litigants' federal claims promptly, abstention is a discretionary tool that can promote federalism and comity. Where sensitive constitutional issues are at stake or delay would cause the litigants irreparable harm, however, federal courts should decide the case. Overall, the courts' constrained approach to abstention and certification has generally been appropriate, showing respect for both federalism and individual rights.

### Habeas Corpus

Habeas corpus has a grand role in protecting against overreaching by the executive, as illustrated by the anti-terrorism and Guantánamo cases. Habeas corpus limits and exclusions as they apply to suspects in these cases are currently being examined by Congress and the courts. I prefer not to comment specifically on these *sub judice* matters now, but it is appropriate to quote Justice Scalia in *Hamdi v. Rumsfeld*, an enemy combatant case.

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<sup>364</sup>Nicholson v. Scopetta, 820 N.E.2d 840, 844 (N.Y. 2004).

<sup>365</sup>Joanna Grossman, *A New York High Court Decision on Domestic Violence: Can a Parent Be Guilty of Neglect Simply Because She Is Victimized in the Presence of Her Children?*, FINDLAW, Dec. 28, 2004, <http://writ.corporate.findlaw.com/grossman/20041228.html>.

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.

[The] gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. [These] due process rights have historically been vindicated by the writ of habeas corpus.

In England before the founding, the writ developed into a tool for challenging executive confinement. [The] writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. Hamilton lauded “the establishment of the writ of habeas corpus” in his Federalist defense as a means to protect against “the practice of arbitrary imprisonments . . . in all ages, [one of] the favorite and most formidable instruments of tyranny.” The Federalist No. 84.<sup>366</sup>

Habeas petitions have a pervasive role in protecting against unfair convictions in thousands of state and federal criminal cases.<sup>367</sup> These applications for the writ by prisoners do not present an undue burden on our federal courts.<sup>368</sup> Neither rebellion nor invasion, the two criteria for suspension, justify the unduly restrictive case law and statutory limits imposed by such measures as the Antiterrorism and Effective Death Penalty Act (“AEDPA”).<sup>369</sup> Claims of

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<sup>366</sup>Hamdi v. Rumsfeld, 542 U.S. 507, 554-57 (2004) (Scalia, J., dissenting, joined by Justice Stevens); see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 276-91 (16th ed. 2007).

<sup>367</sup>JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE: CPLR Art. 70 (2d ed. 2007) (¶ 7001.03 describes the relationship to Article 44 of the New York Criminal Procedure law, which is the equivalent of 18 U.S.C. §§ 2854 and 2855 dealing with challenges to convictions claimed to be unconstitutional); see also, e.g., IRA ROBBINS, HABEAS CORPUS CHECKLISTS (2002); Mark Hamblett, *Conviction Upset Over Defense Failure to Test Victim’s Memory*, N.Y.L.J., Sept. 5, 2007, at 1.

<sup>368</sup>U.S. CONST. art. I, § 9 (“[T]he Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or invasion the Public Safety may require it.”). *But see* 2006 amendment to incorporate 28 U.S.C. § 2241(e) limiting power over alien enemy combatants and current controversy.

<sup>369</sup>Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); see, e.g., Rodriguez v. Miller, 499 F.3d 136, 144 (2d Cir. 2007) (denying

frivolity and overburdened courts are grossly exaggerated.

As I pointed out above in discussing the need for effective counsel in habeas corpus proceedings, AEDPA has effectively limited the right to relief from state and federal convictions. As a result, I have little doubt that more unfairly convicted and innocent people are languishing in our prisons. Of course, the criminal justice system will never be perfect. But increasing restrictions on use of the Great Writ have made criminal prosecutions less reliable than they should be. After AEDPA obtaining habeas corpus became more difficult, time consuming and complicated.

AEDPA made the following changes:

1. Established a one-year statute of limitations for filing a federal habeas petition, which begins when appeal of the state judgment is complete and is tolled during “properly filed” state post-conviction proceedings;<sup>370</sup>
2. Authorized federal judges to deny on the merits any claim that a petitioner failed to exhaust in state court;<sup>371</sup>
3. Limited a federal court’s authority to hold evidentiary hearings when the petitioner failed to develop the facts in state court;

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petition it would have granted because of exclusion of family from courtroom, based upon *Carey v. Macladin*, 127 S. Ct. 649 (2006); under AEDPA the Courts of Appeals cannot look to their own precedents for defining unconstitutionality, but must look to Supreme Court holdings); Mark Hamblett, *Following High Court Cue, Circuit Cancels Habeas Grant*, N.Y.L.J. Aug. 30, 2007, at 1.

<sup>370</sup>28 U.S.C. § 2243(d); 28 U.S.C. § 2254(d)(e); *see, e.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2327 (2007) (“AEDPA limited rather than expanded the availability of habeas relief”); *Lawrence v. Florida*, 127 S. Ct. 1079, 1082 (2007) (AEDPA sets one-year statute of limitations).

<sup>371</sup>28 U.S.C. § 2254(b)(c).

4. Barred successive petitions, except in limited circumstances and with the consent of the Court of Appeals;<sup>372</sup>
5. Mandated a new standard of review for evaluating state court determinations of fact and applications of constitutional law; and
6. Set special proceedings for capital cases.<sup>373</sup>

A study supported by the National Institute of Justice established that after AEDPA:

1. It took substantially longer to complete both capital and non-capital cases in district court;
2. Evidentiary hearings in non-capital cases were rare;
3. A large proportion (22%) of non-capital and 4% of capital cases were dismissed as time barred;
4. In 93% of non-capital cases the petitioner had no counsel, approximately the same proportion as prior to AEDPA;
5. Where magistrates reported to judges for disposition, time to completion was greater; and
6. Fewer petitions on average were granted.<sup>374</sup>

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<sup>372</sup>28 U.S.C. § 2243(b)(3); 28 U.S.C. § 2253(c)(2).

<sup>373</sup>28 U.S.C. § 2261.

<sup>374</sup>NANCY J. KING, FRED L. CHEESMAN II, & BRIAN J. OSTROM, HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 5-12 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>. The study includes thirteen non-New York federal district courts but has some statistics on all districts. The study did not cover the effect of review by the Courts of Appeals. See also Thomas C. O’Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death*

Courts in the Second Circuit have been liberal in using the writ to protect against denial of constitutional rights. The generally high standards of criminal practice in New York state courts have also limited the need for federal intervention. In the more than five hundred cases of state convictions I reviewed, I found only one which I thought was a clear miscarriage of justice—after I granted the writ, the state dismissed—and about a dozen where there were serious constitutional errors warranting a retrial.<sup>375</sup>

As a result of DNA and other evidence, we know—what has long been evident—that many cases where there appears to have been no procedural error result in false convictions. Vigilance is required. My own view is that in each of the 2006-07 Supreme Court decisions involving habeas corpus where the writ was denied, it should have been granted.<sup>376</sup> One vote

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*Penalty Act*, 41 HARV. C.R.-C.L. L. REV. 299 (2006) (author is a prisoner who took a paralegal correspondence course); Muhammad Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(d)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361 (2007).

<sup>375</sup>See *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303 (E.D.N.Y. 2003); *Murden v. Artuz*, 497 F.3d 178, 188 n.7 (2d Cir. 2007) (citing report on 500 habeas cases).

<sup>376</sup>See *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007) (California; 5-4 decision, denying writ; “[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the substantial and injurious effect ‘standard’”) (I agree with the minority that there was grave doubt of the harmlessness of the error in excluding key defense testimony); *Ayers v. Belmontes*, 127 S. Ct. 469, 480 (2006) (California; 5-4 decision denying writ; instructions were consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings) (I agree with the minority that the jury might well have failed to consider constitutionally relevant evidence for the defendant); *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007) (Florida; 5-4 decision excluding time while a petition for certiorari was pending from tolling period for statute of limitations) (I agree with the dissent); *Wharton v. Bockting*, 127 S. Ct. 1173, 1177 (2007) (Nevada; Supreme Court’s *Crawford* decision applying new hearsay rule on confrontation did not apply retroactively) (I agree with this unanimous decision); *Abdul-Kabir v. Quartermain*, 127 S. Ct. 1654, 1675 (2007) (Texas; 5-4 decision granting writ because the jury’s power to consider defendant’s moral culpability was not properly explained) (I agree with the majority); *Smith v. Texas*, 127 S. Ct. 1686, 1698-99 (2007)

often means the difference between life and death.<sup>377</sup> In some areas of the country the lack of adequate trial counsel and state procedures strongly support vigorous exercise of federal power to grant the writ.

### Statutes of Limitations

Construing statutes of limitations so that potential plaintiffs do not have a realistic opportunity to find out that they have been injured, and by whom, is another way to close the courts to people with bona fide grievances, and is contrary to Lincoln's view.

It is particularly regrettable when the promise of redress for a violation of legislation specifically designed to help a class of persons is effectively blocked by the courts. As the litigant is about to cross the moat guarding the castle of discrimination, the courts slam down the portcullis. Such a case was *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>378</sup> The plaintiff, a

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(Texas; 5-4 decision; jury improperly not allowed to consider all mitigating evidence) (I agree with the majority); *Brewer v. Quartermain*, 127 S. Ct. 1706, 1710 (2007) (Texas; 5-4; jury improperly prevented from considering mitigating evidence) (I agree with the majority); *Roper v. Weaver*, 127 S. Ct. 2022, 2024 (Missouri; 7-2; writ should not have been dismissed as premature) (I agree with the majority); *Panetti v. Quartermain*, 127 S. Ct. 2842, 2848 (2007) (Texas; 5-4; claim of incompetency to be executed not barred by prohibition against successive applications) (I agree with the majority).

<sup>377</sup>See Christopher Dunn, *Justice Kennedy: The Man in Control of the Death Penalty*, N.Y.L.J., Aug. 28, 2007, at 34 (discussing review of 68 signed opinions of 2006-07 Supreme Court term; "frustration with death penalty rulings emanating from Texas").

<sup>378</sup>127 S. Ct. 2162 (2007); see also *Wallace v. Kato*, 127 S. Ct. 1091, 1091, 1100 (2007) (holding that section 1983 suit for false imprisonment was barred because the cause of action occurred at the time of arrest; the false imprisonment ended when plaintiff was bound over by the magistrate for trial, not when the State dropped charges against him); Joanna Grossman, *The Supreme Court Considers a Procedural Roadblock to Recovery Under the Age Discrimination in Employment Act*, FINDLAW, Oct. 30, 2007, <http://writ.news.findlaw.com/grossman/20071030.html> (premature suit; "*Ledbetter* is only the tip of the iceberg in terms of procedural barriers to substantive remedies under federal anti-discrimination laws. The combination of strict procedural doctrines, limited protection for

woman discriminated against over the years of her employment by a pay schedule giving more to men than women for equal work, was denied a remedy because she filed her EEOC complaint more than 180 days after her first discriminatory paycheck. Her paychecks over the years would not have alerted her that they were for less than those of her similarly situated male colleagues. A reasonable interpretation would have permitted her to go back 180 days from her complaint and forward from that time.

The main problem with *Ledbetter*'s five-vote majority decision is that it ignores the reality of employment. It would require a new employee to come in with a chip on her shoulder, try to find out what others were being paid, and then sue within 180 days of her first employment. As Justice Ginsberg put it in her dissent:

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in *Ledbetter*'s case, in small increments; cause to suspect that discrimination is at work develops only among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.<sup>379</sup>

Yet, because the Supreme Court's decision in *Ledbetter* was not based on the Constitution, it may be easily rectified by Congress. The Legislature immediately started action to adopt the dissent's view.<sup>380</sup>

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retaliation, and the empirical realities as to how difficult it is for employees to perceive and report discrimination, means that these laws offer far less than the robust protection we might assume.”).

<sup>379</sup>*Ledbetter*, 127 S. Ct. at 2178-79.

<sup>380</sup>See Interview by Jim Lehrer with Speaker and Congresswoman Nancy Pelosi, Public Broadcasting Service Evening News Hour, Aug. 2, 2007; H.R. 2831, 110th Cong. (2007);

## Government Privileges

Government privileges introduce a non-Lincolnian barrier between the people and their government. Strict rules of privilege hinder our aim of finding “the whole truth, and nothing but the truth.” While they do serve social purposes, I remain dubious about whether more flexible rules of privilege would really be deleterious to such relationships and interests as husband-wife,<sup>381</sup> attorney-client,<sup>382</sup> psychotherapist-patient,<sup>383</sup> trade secrets owners<sup>384</sup> and political voters.<sup>385</sup> But, then, I reflect on the terrible sense of anonymity and loneliness that pervades our society and I opt for the consensus: Wigmore was probably right when he argued on utilitarian grounds that it better serves society to sacrifice some types of evidence that are otherwise relevant in the administration of justice to encourage favored relationships and interests and, I would now add, our need for privacy and protection against government intrusions.<sup>386</sup>

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Marcia Coyle, *Employment Cases Spur Congress to Act*, NAT’L L.J., Aug. 20, 2007, at 1 (discussing reversal of *Ledbetter* on statute of limitations; amendment to definition of “disability” to reverse recent court decisions narrowing eligibility). But see the more favorable decision in class actions, *In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d Cir. 2007) (filing of class action tolls statute of limitations even if action was begun before certification).

<sup>381</sup>See *Hawkins v. United States*, 358 U.S. 74 (1958).

<sup>382</sup>See *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

<sup>383</sup>See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>384</sup>See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>385</sup>See *In re Dinnan*, 661 F.2d 426, 432 (11th Cir. 1981).

<sup>386</sup>See 8 WIGMORE, EVIDENCE 2285, at 527 (McNaughton rev. ed. 1961); *Jaffee*, 518 U.S. at 11 (“Our cases make clear that an asserted privilege must also serv[e] public ends.”) (internal quotation marks and citations omitted); see also, e.g., 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE Article V (Joseph M. McLaughlin ed., 2d ed. 2006); cf. Nathan Books, *Information Privacy*, FED. LAWYER, Sept. 2007, at 4. The insistence

## State Secrets

As to our increasingly powerful and secretive government, in many instances the people would be better served if we limited the privileges it invokes. Government privileges have expanded—particularly the state secret and executive privilege doctrines—unnecessarily keeping information about their government from the people. The interest in accurate judicial fact-finding and our ability to scrutinize the government’s decision-making process are important reasons to limit this growth of secrecy. As Justice Brennan observed, there is an inherent paradox in the government’s rationale: “[S]o as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government.”<sup>387</sup>

Illustrative of overreaching is the state secrets privilege, first recognized by the Supreme Court in 1953 in *United States v. Reynolds*.<sup>388</sup> In *Reynolds*, an Air Force plane testing secret

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by the Department of Justice that Federal Rule of Evidence 502 be amended to give the government a chance to break into the attorney-client privilege is distressing. See, e.g., Michelle Lambert, *Turning Out the Light of Reason and Experience: The Selective Waiver Doctrine and Proposed Federal Rule of Evidence 502*, 81 ST. JOHN’S L. REV. 921 (2007) (highly critical of proposal).

<sup>387</sup>*Herbert v. Lando*, 441 U.S. 153, 159 (1979) (Brennan, J., dissenting). While the executive branch of our government has expanded its use of the state secrets and executive privilege, it has also sought reductions in the attorney-client privilege, particularly in white-collar crime cases. See Elkan Abramowitz & Barry A. Bohner, *Privilege Waivers: The Pendulum Swings*, N.Y.L.J., Sept. 4, 2007, at 3 (forced waivers in white-collar crime cases being fought by the bar).

<sup>388</sup>*United States v. Reynolds*, 345 U.S. 1 (1953). Although this privilege can be traced back to Aaron Burr’s trial for treason, its modern use stems from British precedent established during World War II. See *id.* at 7 n.15 (citing *Duncan v. Cammell, Laird & Co.*, 1942 A.C. 624 (upholding claim of privilege for submarine plans)).

electronic equipment crashed and killed several on-board civilians.<sup>389</sup> When the widows of the deceased sought production of an Air Force accident report, the Secretary of the Air Force refused to turn it over on the grounds that revelation would hamper national security.<sup>390</sup> Although the *Reynolds* Court recognized that the state secret privilege applied, it did not grant the executive carte blanche: it ruled that the judiciary must be the final arbiter of the claim and that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officials.”<sup>391</sup>

In 2000, fifty-two years after the crash when the Air Force report was finally declassified, we learned that it contained no state secrets relating to national security.<sup>392</sup> Instead, the report showed that the crash and resulting deaths were caused by ordinary negligence.<sup>393</sup> The very case recognizing the “state secret” privilege was based on an executive impulse to conceal its own mistakes and to deny relief to those who had been wronged.

Ignoring *Reynolds*’s limitations, the executive branch has expanded its reliance on the state secret doctrine.<sup>394</sup> And our courts seem to be accepting the executive’s assertions without

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<sup>389</sup>*Id.* at 3.

<sup>390</sup>*Id.* at 5.

<sup>391</sup>*Id.* at 9-10.

<sup>392</sup>*See* Herring v. United States, No. 03-CV-5500, 2004 WL 2040272, at \*7-8 (E.D. Pa. Sept. 10, 2004), *aff’d*, 424 F.3d 384 (3d Cir. 2005) (discussing whether the *Reynolds* case should be reopened based on the declassified accident report).

<sup>393</sup>*Id.* at \*8.

<sup>394</sup>*See* Eric Lichtblau, *U.S. Cites ‘Secrets’ Privilege as It Tries to Stop Suit on Banking Records*, N.Y. TIMES, Aug. 31, 2007, at A17 (“The Bush Administration is signaling that it plans to turn again to a legal tool, the ‘state secrets’ privilege, to try to stop a suit against a

thoroughly examining their validity. For instance, in the torture-rendition cases of Maher Arar and Khaled El-Masri, the government successfully sought outright dismissal of claims based on the state secret doctrine at the pleading stage.<sup>395</sup> Even in civil rights<sup>396</sup> and whistle-blowing actions,<sup>397</sup> which generally have nothing to do with national security, our courts have unnecessarily expanded the state secret doctrine to push litigants out of court.<sup>398</sup>

Less expansive rules should be considered. When faced with important state secrets, a court can close the courtroom, place briefs under seal, and order parties to sign and adhere to protective

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Belgian banking cooperative that secretly supplied millions of private financial records to the United States government.”); Tim Golden, *How Navy Lt. Cmdr. Matthew Diaz Put Himself in the Middle of the Prisoner-Detention Issue—And Went to Jail for It*, N.Y. TIMES MAG., Oct. 21, 2007, at 78 (revealed information probably wrongfully withheld as a military secret at Guantánamo Bay hearings); Philip Taubman, *In Death of Spy Satellite Program, Lofty Plans and Unrealistic Bids*, N.Y. TIMES, Nov. 11, 2007, at A1 (“The story behind that failure has remained largely hidden, like much of the workings of the nation’s intelligence establishment.”).

<sup>395</sup>See Editorial, *A Judicial Green Light for Torture*, N.Y. TIMES, Feb. 26, 2006, at A11 (Maher Arar); Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12 (Khaled El-Masri).

<sup>396</sup>See, e.g., *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (affirming the dismissal of a Title VII racial discrimination suit on the basis of the state secret privilege), *cert. denied*, 546 U.S. 1093 (2006); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 628 (E.D. Va. 2000) (dismissing sex discrimination suit on the basis of the state secret privilege).

<sup>397</sup>See, e.g., *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (dismissing whistle-blowing action on the basis of state secret privilege), *aff’d*, 161 F. App’x 6 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming district court’s dismissal of whistle-blowing claims against the Air Force seeking compliance with hazardous waste inventory, inspection, and disclosure responsibilities).

<sup>398</sup>For a detailed review of government misuse of the state secret privilege, see Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007).

orders promising not to leak any information.<sup>399</sup> Judges also have the option of requiring attorneys to seek security clearances.

### Executive Privilege

Executive privilege has also recently been utilized to hobble reasonable inquiries. As indicated in the discussion of transparency, below, the effect has been to unnecessarily prevent the people from knowing what their government is doing and to control its activities and policies.<sup>400</sup> The legitimacy of this privilege was recognized by the Burger Court in 1974 in *United States v. Nixon*, a case involving the Watergate special prosecutor's subpoena requiring President Nixon to produce the Oval Office audiotapes.<sup>401</sup> The *Nixon* Court severely circumscribed the privilege when it recognized that although there is a need for protection of communications between high government officials, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can

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<sup>399</sup>*See In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427, 429, 433 (E.D.N.Y.1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *id.* at 425 (adopting special master's protective order for Department of Agriculture documents); *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 429-30 (E.D.N.Y. 2007) (enjoining individuals from disseminating documents under a protective order).

<sup>400</sup>*See, e.g.*, Editorial, *Overprivileged Executive*, N.Y. TIMES, July 11, 2007, at A18 ("Executive privilege, which is not mentioned in the Constitution, is a judge-made right of limited scope, intended to create a sphere of privacy around the president so that he can have honest discussions with his advisers."); David Johnston & Scott Shane, *Debate Erupts on Techniques Used by C.I.A.*, N.Y. TIMES, Oct. 5, 2007, at A1; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1; Michiko Kakutani, *The Case That the President's Reach Exceeds His Grasp*, N.Y. TIMES, Sept. 25, 2007, at E8 (secrecy); *Judge Rules on Bush's Order About Presidential Records*, N.Y. TIMES, Oct. 2, 2007, at A18 (former presidents and vice presidents cannot review records before release under Freedom of Information Act).

<sup>401</sup>*United States v. Nixon*, 418 U.S. 683, 686 (1974).

sustain an absolute, unqualified Presidential privilege of immunity from judicial process . . . .<sup>402</sup> The Court affirmed the validity of the subpoena and held that the larger public interest in obtaining the truth in the context of a criminal prosecution takes precedence over the President's generalized concern of confidentiality.<sup>403</sup> As events demonstrated, the unascertained claims of privilege by the President might have resulted in the concealment of high crimes and misdemeanors.

Although the executive privilege generally involves conflicts between the legislative and the executive branches, particularly in those situations when officials of the executive branch are attempting to thwart congressional inquiries, it has much broader implications. As John Stuart Mill wrote, "publicity is a constituent element of representative democracy."<sup>404</sup> Even though secrecy by the government may have short term advantages, in the long run it can do grave damage to the faith of the American public.<sup>405</sup> This is the assumption on which the Freedom of Information Act ("FOIA") was passed: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."<sup>406</sup>

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<sup>402</sup>*Id.* at 706.

<sup>403</sup>*Id.*

<sup>404</sup>See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 899 n.50 (2006) (citing JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 27 (Currin V. Shields ed., Bobbs-Merrill Co., Inc. 1958) (1861)).

<sup>405</sup>3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 509.12 (Joseph M. McLaughlin ed., 2d ed. 2006).

<sup>406</sup>Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897-98 n.44 (citing H.R. REP. NO. 89-1497, at 12 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2429).

Over recent years, starting in 1998, the executive branch of our people's government has used the privilege to hide critical information from the people.<sup>407</sup> For instance, in the congressional inquiry related to the dismissal of federal prosecutors by the White House, officials of the executive branch have invoked the privilege at least three times.<sup>408</sup> The Executive has even invoked the privilege to thwart a meaningful congressional inquiry into the death of Pat Tillman, a soldier and a star defensive back for the Arizona Cardinals who enlisted in the Army after September 11, and was killed while serving in Afghanistan.<sup>409</sup>

Blocking of congressional inquiries through executive privilege and narrow application of FOIA not only adversely affects our democratic values of transparency and open government, but also often directly affects the rights of litigants in our courts. Congressional inquiries are especially important because they make public secret knowledge which can then be used in

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<sup>407</sup>See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 39 (D.D.C. 1998) (denying President Clinton's assertion of executive privilege to block prosecutors from questioning his senior aides about Monica Lewinsky); Neil A. Lewis, *Bush Claims Executive Privilege in Response to House Inquiry*, N.Y. TIMES, Dec. 14, 2001, at A26 (assertion of the privilege by President Bush to block congressional inquiry into the FBI's use of mob informants in Boston). Similar problems exist at the state level. See, e.g., Danny Hakim, *Senate G.O.P. Hearings May Start by Next Week*, N.Y. TIMES, Aug. 1, 2007, at B3 (two of the governor's top aides refused to be interviewed by the Attorney General's investigators on the use of New York State Police to plant a negative story in the press about Senate Republican Majority Leader, Joseph L. Bruno).

<sup>408</sup>Sheryl Gay Stolberg, *Bush Moves Toward Showdown with Congress on Executive Privilege*, N.Y. TIMES, June 29, 2007, at A23 (assertion of the privilege by President Bush to refuse compliance with congressional subpoenas for documents related to the dismissal of federal prosecutors); Editorial, *Contempt for Congress*, N.Y. TIMES, July 14, 2007, at A10 (assertion of executive privilege by former White House officials Harriet Miers and Sara Taylor in congressional investigation related to the dismissal of federal prosecutors).

<sup>409</sup>Neil A Lewis, *Retired General Is Censured for Role in Tillman Case*, N.Y. TIMES, Aug. 1, 2007, at A16; Editorial, *Seeking the Truth About Pat Tillman*, N.Y. TIMES, July 27, 2007, at A22.

legislation, public prosecutions and private litigations. For example, after epidemiological studies found a link between cigarette smoke and lung cancer in the early 1950s, the first two waves of tobacco litigation failed. It was a Food and Drug Administration (“FDA”) study and public inquiry by the House of Representatives that led to the revelations of the FDA, the Surgeon General, and other evidence on which subsequent tobacco cases were built. Another example is the 1976 report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, also known as the Church Committee Report, which revealed that the United States intelligence agencies were conducting illegal surveillance of American citizens.<sup>410</sup> This report gave rise to several federal court *Bivens* actions in which plaintiffs sought money damages for their constitutional violations.<sup>411</sup>

Perhaps more important, unfettered inquiries into executive misuse of power may deter future illegality as government officials come to understand that their conduct will be publicly disclosed, and that they will be held accountable. Professor Rudalevige, in his book *The New Imperial Presidency*, has summarized much of the modern struggle between presidential claims of confidentiality and those of the people who need to learn what their government is doing.<sup>412</sup>

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<sup>410</sup>Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities,. Book II, S. REP. NO. 94-755 (1976), *available at* <http://www.aarclibrary.org/publib/church/reports/book2/contents.htm>.

<sup>411</sup>*See, e.g.,* my case, *Birnbaum v. United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

<sup>412</sup>ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY* 7 (2006). Noting the bounds placed on executive secrecy by the Supreme Court in *United States v. Nixon*, and by Congress in the Presidential Materials and Preservation Act (“PMPA”), the Freedom of Information Act (“FOIA”) amendments of 1974, the Presidential Records Act (“PRA”) of 1978, and the Privacy Act of 1974, Rudalevige observes that “[o]ne after another, then, the assumptions and process that had extended the president’s power, his ability to shape governmental behavior and

He concludes by quoting Justice Stewart in *New York Times v. United States*: “The only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can protect the values of a democratic government.”<sup>413</sup>

### Government Immunity

While executive privilege enables the government to hide its activities from the people, sovereign immunity not only prevents openness by preventing pretrial discovery, but prevents enforcing accountability even when facts adverse to officials are known.

### Sovereign Immunity

Sovereign immunity is a barrier to court access—a right Justice Marshall recognized in *Marbury v. Madison*,<sup>414</sup> when he wrote: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>415</sup> It “places the government above the law and . . . ensures that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.”<sup>416</sup>

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outcomes, were reformed or removed” by either Congress or the courts. *Id.*

<sup>413</sup>*Id.* at 281 (citing *N.Y. Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

<sup>414</sup>*Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>415</sup>Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001). *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 143-49 (16th ed. 2007) (note on State Sovereign Immunity and the Eleventh Amendment); *id.* at 735 (*United States v. Georgia*, 546 U.S. 151, 153 (2006) distinguished disability related claims by state prisoners under § 5 of the Fourteenth Amendment).

<sup>416</sup>Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 n.6 (2001) (citing John E. H. Sherry, *The Myth That the King Can Do No Wrong: A Comparative*

Immunity is inconsistent with several fundamental notions underlying our people-centered legal system. “It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own.”<sup>417</sup> Yet the Supreme Court has dramatically expanded the scope of the doctrine within the past thirty years.<sup>418</sup>

The rules of sovereign immunity are derived from English law, which assumed that the

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*Study of the Sovereign Immunity Doctrine in the United States and New York Courts of Claims*, 22 ADMIN. L. REV. 39, 58 (1969)).

<sup>417</sup>Alden v. Maine, 527 U.S. 706, 802 (1999) (Souter, J., dissenting). “[T]here is much irony in the Court’s profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy.” *Id.* at 811.

<sup>418</sup>Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001); *see also* Alden v. Maine, 527 U.S. 706, 712 (1999) (“We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (“We hold that notwithstanding Congress’ clear intent to abrogate the States’ sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), may not be used to enforce § 2710(d)(3) against a state official.”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that a federal law authorizing suits against states for patent infringement exceeded the scope of Congress’s § 5 authority); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that state governments cannot be sued for violating the Age Discrimination in Employment Act); *Bd. of Trustees of Univ. of Ala. v. Garret*, 531 U.S. 356, 360 (2001) (holding that state governments cannot be sued for violating Title I of the Americans with Disabilities Act); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (articulating the government contractor defense, intended to protect the government from liability for actions that Congress has not seen fit to include within the scope of any waiver of sovereign immunity). *But see* *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that Title II of the Americans with Disabilities Act validly abrogated Eleventh Amendment immunity and did not bar a suit against a state).

King can do no wrong.<sup>419</sup> The monarch could not be sued without his consent,<sup>420</sup> but there was no bar to suits against the King's inferior officers.<sup>421</sup>

### Eleventh Amendment

In the original Constitution there was no reference to sovereign immunity. The United States adopted a form of state immunity from suits in federal court when it passed the Eleventh Amendment in 1798, providing: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment was adopted to prevent British creditors from pursuing American debtors, not to protect a state from future claims of its own citizens. It was a response to the Supreme Court's decision in *Chisholm v. Georgia*,<sup>422</sup> which seemed to open states up to

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<sup>419</sup>Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

<sup>420</sup>Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

<sup>421</sup>John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law For the Redress of Wrongs*, 115 YALE L.J. 524, 553 (2005).

<sup>422</sup>*Chisholm v. Georgia*, 2 U.S. 419 (1793).

[S]tates were concerned about the *Chisholm* decision because they feared suits against them to collect unpaid Revolutionary War debts. Also, there was fear that British creditors and American Tories whose property was seized during the war would sue the states to recover their assets. The fact that such suits already had been filed in South Carolina, Georgia, Virginia, and Massachusetts indicated that it was not an idle fear. Thus, within a few years after *Chisholm*, the Eleventh Amendment was adopted.

such suits. When first ratified, the Eleventh Amendment was not construed to “apply to controversies between a citizen and his own state, or to suits against state officers to recover money in the state treasury claimed to be due under federal law.”<sup>423</sup> The Supreme Court has vastly expanded its reach.<sup>424</sup> By its terms, the Amendment only prohibits federal courts from hearing suits against a state by citizens of other states and foreign countries.<sup>425</sup> Its language does not warrant a “reading . . . creating a constitutional bar to suits against states by their own citizens.”<sup>426</sup> Since constitutional doctrine is involved, congressional ability to ameliorate it is almost nonexistent.

The Rehnquist Court was a major force in the expansion of Eleventh Amendment sovereign immunity “as a restriction on the subject matter jurisdiction of the federal courts that

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<sup>423</sup>Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 8 (1988). The Amendment did allow an action to proceed against a state officer if the state could not be named as a defendant, and by the 1880s, the Court “came to find that suits nominally against state officers, and brought by out-of-state citizens or foreign citizens, were barred by the amendment.” *Id.* at 9.

<sup>424</sup>*See, e.g.,* Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) (holding that the Eleventh Amendment is a constitutional limit on federal subject matter jurisdiction and that Congress may only abrogate that immunity from suit by its powers under § 5 of the Fourteenth Amendment); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (holding that the Eleventh Amendment extended to suits brought by citizens of the states being sued); Alden v. Maine, 527 U.S. 706, 713 (1999) (establishing that state sovereign immunity is neither derived from, *nor limited by*, the literal text of the Eleventh Amendment) (emphasis added).

<sup>425</sup>*See* U.S. CONST. amend. XI.

<sup>426</sup>ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 188 (2d ed., Aspen Publishers 2002) (citing Lawrence Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1999)). *But see* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (interpreting the amendment as prohibiting suits against a state by its own citizens, as well as by citizens of other states and foreign countries).

bars all suits against state governments.”<sup>427</sup> First, the Court provided a broad conception of sovereign immunity and held that a suit is barred by the Eleventh Amendment if the judgment would affect the public treasury, interfere with public administration, or restrain the government from acting or compel it to act.<sup>428</sup> Next, it held that the Eleventh Amendment protects states from virtually all suits in federal court.<sup>429</sup> In *Alden v. Maine*, the Court ruled that state governments cannot be sued in state court without their consent,<sup>430</sup> even though the Amendment appears to limit only federal judicial power.

The Rehnquist Court continued expanding the doctrine.<sup>431</sup> In *Seminole Tribe of Florida v. Florida*,<sup>432</sup> it “held that Congress may abrogate the Eleventh Amendment only when acting under its § 5 [of the Fourteenth Amendment] powers.” Increased restrictions followed in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, *Kimel v. Florida Board of Regents*, and *University of Alabama v. Garrett*.<sup>433</sup> The Court “has required

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<sup>427</sup>ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 185 (2d ed., Aspen Publishers 2002).

<sup>428</sup>*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

<sup>429</sup>*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1989).

<sup>430</sup>*Alden v. Maine*, 527 U.S. 706, 755 (1999) (“[S]overeign immunity bars suits only in the absence of consent”).

<sup>431</sup>*Cf. Ford Motor Co. v. Dep’t of the Treasury*, 323 U.S. 459, 464 (1945) (holding that a state may invoke sovereign immunity when it is effectively the real party in interest, even though individual officials are “nominal defendants.”).

<sup>432</sup>*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

<sup>433</sup>*See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that a federal law authorizing suits against states for patent infringement

Congress's intent to be explicit in order to override state sovereignty pursuant to the Fourteenth Amendment."<sup>434</sup> A broad authorization for suit in federal court is not sufficient to abrogate a state's immunity from suit.<sup>435</sup> Because the Court limited the scope of Congress's powers under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*,<sup>436</sup> these additional restrictions profoundly limit Congress's ability, when carrying out federal policy, to abrogate states' immunity.

It is still recognized that the Eleventh Amendment does not bar federal court suits by the United States government against a state<sup>437</sup> or suits against a state by another state.<sup>438</sup> There is

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exceeded the scope of Congress's § 5 authority); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that state governments could not be sued for violating the Age Discrimination in Employment Act); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that state governments cannot be sued for violating Title I of the Americans with Disabilities Act).

<sup>434</sup>ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 222 (2d ed., Aspen Publishers 2002).

<sup>435</sup>*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.").

<sup>436</sup>*City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."). *But cf.* *Bd. of Trustees of Univ. of Ala. v. Garret* 531 U.S. 356, 360 (2001) (taking a more crabbed view for a state employee). By contrast with *Garret*, the Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2000), more generously viewed a suit under the Family Leave Act against the state as not being blocked by the Eleventh Amendment.

<sup>437</sup>*See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); *United States v. Texas*, 143 U.S. 621 (1892) ("We are of the opinion that this court has jurisdiction to determine

also an exception for suits in admiralty.<sup>439</sup>

Since the Eleventh Amendment only applies in federal court, it does not guarantee that a state has immunity against suits in its own courts, in another state's courts, or in the Supreme Court as part of that Court's explicit constitutional jurisdiction.<sup>440</sup> Congress may, of course, waive the federal government's own immunity, as under the Federal Tort Claims Act.<sup>441</sup> And many states permit suits against themselves, as does New York through its Court of Claims.

The Court has somewhat limited its expanded scope of the Eleventh Amendment in a number of cases. For example, in *United States v. Georgia*<sup>442</sup> it allowed a disabled inmate of a

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the disputed question of boundary between the United States and Texas.”).

<sup>438</sup>*See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) (“Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another state.”).

<sup>439</sup>*See, e.g., Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) (holding that the Eleventh Amendment did not bar a federal court from issuing a warrant in an in rem action for a wreckage in an admiralty suit); *California v. Deep Sea Research*, 523 U.S. 491, 507-08 (1998) (holding that the Eleventh Amendment does not bar jurisdiction over an in rem admiralty suit where the state is not in possession of the property).

<sup>440</sup>ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 193 (2d ed., Aspen Publishers 2002).

<sup>441</sup>*Id.* at 215. The Federal Tort Claims Act waives sovereign immunity in suits against the United States “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b) (1997).

<sup>442</sup>*United States v. Georgia*, 546 U.S. 151, 159-60 (2006) (“[I]nsofar as Title II creates a private cause action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates sovereign immunity. The Eleventh Circuit erred in dismissing those of Goodman's Title II claims that were based on such unconstitutional conduct.”).

state prison to sue the state under a federal statute protecting the disabled.

A major avenue for litigants to pursue cases against the state in federal court is provided by *Ex Parte Young*.<sup>443</sup> According to *Young*, “the Eleventh Amendment does not preclude suits against state officers for injunctive relief, even when the remedy will present the implementation of an official state policy.”<sup>444</sup> It recognizes a distinction between a state and its officers.

Officers who act illegally are stripped of state immunity’s cloak and may be sued in federal court. Like other *nisi prius* judges, I have made modest attempts to control the reach of state sovereign immunity,<sup>445</sup> which prevents vindication of individual rights.

“[T]he constitutional status of the states’ immunity continues to bar important forms of relief on federal claims and to impose unusual barriers to the exercise of Congress’ power to overcome state immunity.”<sup>446</sup> Imposition of such barriers is unfortunate<sup>447</sup> because the doctrine

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<sup>443</sup>*Ex Parte Young*, 209 U.S. 123, 155-56 (1908) (“[I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.”).

<sup>444</sup>ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 199 (2d ed., Aspen Publishers 2002).

<sup>445</sup>For example, in *Royal Ins. Co. of America v. RU-VAL Electric Corp.*, I found that a Board of Fire Underwriters formed by insurance companies pursuant to an act of the state legislature was not entitled to immunity because it was not an employee of the town, which would have been entitled to immunity. *Royal Ins. Co. of America v. RU-VAL Electric Corp.*, 918 F. Supp. 647, 654-55 (E.D.N.Y. 1996). In another case, I noted that “merely obtaining money from the State of New York does not confer Eleventh Amendment Immunity.” *Travesio v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.*, No. 94-CV-5756, 1995 WL 704778, at \*6 (E.D.N.Y. Nov. 16, 1995).

<sup>446</sup>Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 (1988).

of sovereign immunity is inconsistent with the Constitution, the ideas of the Framers, and fundamental notions of our legal system, allowing free access to courts, both state and federal. It violates the basic principle “that the government and government officials can do wrong and should be held accountable.”<sup>448</sup>

### Qualified Immunity

When sovereign immunity is avoided by suing a state official under *Ex Parte Young*, the defense of qualified immunity may be raised.<sup>449</sup> Qualified immunity “shield[s] government officials from liability for damages resulting from official performance of discretionary functions.”<sup>450</sup> The Supreme Court first articulated the present standard for qualified immunity in 1974 in *Scheuer v. Rhodes*, noting that

[A] qualified immunity is available to officers of the executive branch of the government, the variation being dependent upon the scope of discretion and

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<sup>447</sup>Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001) (“Sovereign immunity, as applied by the Rehnquist Court, is a right of governments to be free from suit without their consent. Yet, it is a right that cannot be found in the text or the framers’ intent.”); see also Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 78 (1988) (“Despite the Court’s repeated and often eloquent insistence that state sovereign immunity is a principle fundamental to the Constitution, the doctrines of sovereign immunity applied to claims against states in federal courts cannot be justified by exegesis of any portion of the Constitution itself.”). As one prominent scholar has noted, “[s]overeign immunity allows the government to violate the Constitution or laws of the United States without accountability . . . [and] makes the laws of the United States subordinate to the will of the men and women making government decisions.” Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213 (2001).

<sup>448</sup>*Id.* at 1202.

<sup>449</sup>Bless Young & Kurt Gurka, *An Overview of State Sovereign Immunity*, UTAH B.J. Oct. 2004, [http://webster.utahbar.org/barjournal/2004/10/an\\_overview\\_of\\_state\\_sovereign.html](http://webster.utahbar.org/barjournal/2004/10/an_overview_of_state_sovereign.html).

<sup>450</sup>*Quinn v. City of New York*, No. 99-CV-7068, 2003 WL 1090205, at \*2 (E.D.N.Y. Mar. 12, 2003).

responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.<sup>451</sup>

In *Harlow v. Fitzgerald*,<sup>452</sup> the Court explained that qualified immunity protects government officials from liability for civil damages as long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>453</sup> In effect, qualified immunity provides protection to “all but the plainly incompetent or those who knowingly violate the law.”<sup>454</sup> It provides a broad shield from suits, imposing yet another barrier to access to the courts.

The Roberts Court has encouraged broadening the scope of qualified immunity.<sup>455</sup> The Court of Appeals for the Second Circuit has complied.<sup>456</sup> It has emphasized that a district court “*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings.”<sup>457</sup>

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<sup>451</sup>*Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

<sup>452</sup>*Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>453</sup>*Id.* at 818.

<sup>454</sup>*Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>455</sup>*See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007) (finding that a police officer was entitled to qualified immunity because he acted reasonably in attempting to force the respondent’s car off the road during a high speed chase).

<sup>456</sup>*See Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (“[A] defendant will be entitled to qualified immunity if either his actions did not violate clearly established law or it was objectively reasonable for him to believe that his actions did not violate clearly establish law.”).

<sup>457</sup>*Id.* at 159 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998)) (emphasis in original).

Courts in the Eastern District, like others in the Circuit, have upheld broad claims of qualified immunity.<sup>458</sup> Yet, most judges here have often been reluctant to recognize immunity in cases of serious harm.<sup>459</sup> I noted this reluctance to immunize seriously deviant government officials in a case where the government agents invited a television crew to watch it break into a terrified mother's home. I held that "qualified immunity . . . acts to safeguard the government, and thereby to protect the public at large, not to benefit its agents."<sup>460</sup>

The problem with the Supreme Court's recent decisions regarding qualified immunity as well as sovereign immunity is that the states and officials of the state and federal government may be "permitted to act unjustly" behind its shield.<sup>461</sup>

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<sup>458</sup>*See, e.g.* Nwaokocha v. Sadowski, 369 F. Supp. 2d 362 (E.D.N.Y. 2005) (upholding a claim of qualified immunity for employees of the Metropolitan Detention Center when they placed the prisoner in the SHU for suicide watch and subsequently transferred him to another facility); Garcia v. Scopetta, 289 F. Supp. 2d 343 (E.D.N.Y. 2003) (finding officials and employees of the Administration of Child Services and the City of New York were entitled to qualified immunity when there was no clearly established law on what constitutes a neglected child, so defendants could not reasonably have been expected to know whether the initiation of neglect proceedings against plaintiff violated her rights).

<sup>459</sup>Hignazy v. Templeton, No. 05-4148-CV, slip op. (2d Cir. Oct. 19, 2007) (reversing dismissal of suit against F.B.I. agent by person held by government for allegedly having a radio in his hotel room that might have been used to help planes in 9/11 attack on New York City); Zellner v. Summerlin, No. 05-6309-CV, 2007 WL 2067932, at \*1 (2d Cir. July 20, 2007) (holding that the district court erred in granting of qualified immunity because no arguable probable cause for the officers to arrest the plaintiff under any of the statutes cited in defense of the arrest at a protest); Russo v. City of Bridgeport, 479 F.3d 196 (2d Cir. 2007) (holding that qualified immunity was unavailable at summary judgment because the officers' actions violated clearly established law and it was not objectively reasonable for the officers to believe that their actions did not violate such law when they refused to view exculpatory evidence to free a person who was wrongly in prison for robbery); Ayeni v. CBS, Inc., 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (denying qualified immunity to a Secret Service Agent).

<sup>460</sup>Ayeni v. CBS, Inc., 848 F. Supp. 362 (E.D.N.Y. 1994).

<sup>461</sup>Linda Greenhouse, *Beyond Original Intent*, N.Y. TIMES, Aug. 18, 2002.

## Procedural Rules

In contrast to present restrictions on suits, there was an enormous expansion of procedural rights and opportunities for effective litigation beginning with the state Field Codes in the mid-nineteenth century, culminating in the adoption of the Federal Rules in late 1930s. The doors to the courts were opened wide through notice pleading and full attorney-conducted discovery which would permit potential plaintiffs to find out how they had been injured and how they could prove their case.<sup>462</sup> Class action suits were expanded some ten years later to meet the needs of plaintiffs injured in denial of groups' civil rights, mass disasters toxic torts, and the like. These reforms made it easier to prosecute suits where many people claimed injury. Now, legislative- and court-initiated procedures for hobbling mass litigation are on the rise.

Law suits are not increasing unduly and we are not excessively litigious; emphasis on court burdens as an excuse for restriction is largely unsubstantiated or mendacious. In fact, frivolous litigation has been reduced in actual and relative numbers because of:

1. The expense;
2. Expanded and more efficient discovery, which usually makes clear who should win and, if recovery is appropriate, how much it should be;
3. The frequent resolution by administrative agencies of many matters (e.g., SEC and consumer safety) in which they can impose fines;

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<sup>462</sup>Jack B. Weinstein, *A Survey of Changes in United States Litigation*, 76 ST. JOHN'S L. REV. 379 (2002); Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure Are the Barriers to Justice Being Raised?* 62 U. PA. L. REV. 1901 (1988); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988); Jack B. Weinstein, *Reflections of Fifty Years of Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429 (1988).

4. Maturation of the law in many legal fields, enabling attorneys to settle more rapidly because they understand what cases are worth due to availability of information about other cases and the development of specialized bars;
5. Compulsory non-judicial settlement procedures to deflect cases from the courts (*e.g.*, employment and brokerage arbitration agreements); and court-attached mediation and arbitration services;
6. The reluctance, particularly of appellate courts, to allow juries to decide cases—by much increased use of summary judgment, *Daubert* based motions to dismiss, and reversal of rulings for plaintiffs on appeal; and
7. The increased difficulty of sustaining a complaint in some fields because of, for example, specialized pleading requirements, as in fraud and security cases.

It is now harder for a plaintiff to enter the courts<sup>463</sup> because of increased pleading burdens;<sup>464</sup> extensive use of summary judgment to take cases from juries;<sup>465</sup> increased use of

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<sup>463</sup>Richard Brust, John Gibeaut & Jason Krause, *The Company Line: The Supreme Court Is Backing Business with Gusto, Taking Aim at Liability and Litigation Costs*, A.B.A.J., Oct. 2007, at 50; *see* Beth Bar & Sheri Qualters, *Less Litigation Seen by In-House Counsel*, N.Y.L.J., Oct. 25, 2007, at 5.

<sup>464</sup>*See* Edward M. Spiro, *The Supreme Courts Pleading Trilogy*, N.Y.L.J., Aug. 2, 2007, at 3. (“[C]alling, at least in more complex cases, for more specificity from the plaintiff and a greater degree of involvement from the reviewing court than in the past.”). *But cf.* *Jones v. Bock*, 127 S. Ct. 910, 919 (2007) (under Prison Litigation Reform Act general rules of civil procedure apply and inmate need state only a “short and plain statement of the claim,” without negating affirmative defense of no exhaustion; “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”).

<sup>465</sup>*See* discussion of summary judgment under juries, *infra*; *see also, e.g.*, Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEG. ED. 504, 507 (1996) (“It is enough to know that the cases seemed to impose *somewhat* greater burdens on parties opposing summary judgment to come forward with credible evidence to defeat a summary judgment motion. It is a matter of

restrictive statutes of limitations;<sup>466</sup> and expansion of immunity, qualified immunity and executive and other privileges.<sup>467</sup>

In an eloquent plea for easier entry to the courts, my former law clerk, Professor Anita Bernstein, put the matter this way:

A protest that proclaims an injustice based on some failure to comply with a general, categorical principle, rather than merely a failure to please the complainant, fulfills the crucial obligation that a plaintiff state a claim on which relief can be granted. And a protest presented forthrightly *qua* complaint—that is, a proclamation about having been done wrong that the complainant owns, names, and declares plainly enough . . . honors those values about transparency and responsibility that inform legal complaints in public life.

Private and public complaints alike affirm the value of open expression. The amateur complainant speaks to at least one person and often to many; the professional complainant participates in law-making in a process generally held accessible to public view. Courts are accessible to onlookers.

Such liberal and democratic notions suggest not only that private complaints resemble public ones; they also provide reasons to hold them both in high esteem . . . In certain settings, I believe, private complaints can fulfill public ideals.

In the aggregate, such challenges are important and deserve honor: without deeming all complaints justified or politically salient . . . they add up to a force for improvement.<sup>468</sup>

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degree. Cases with serious disputes about material facts will still survive summary judgment, as they always have. But the quantum and quality of evidence needed to defeat a motion for summary judgment seems to be greater today than twenty to thirty years ago. Summary judgment is no longer a bastard device; the Supreme Court has rehabilitated it and made it a respected case management tool.”) (footnote omitted; emphasis in original).

<sup>466</sup>See discussion of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *supra*.

<sup>467</sup>See Dec. 1, 2006 amendment to F.R.E. 408(a)(2) (on the initiative of the Department of Justice); JACK B. WEINSTEIN, CIVIL PROCEDURE AT COLUMBIA 1946-2006 (Sept. 14, 2006) (unpublished). *Bivens* claims for abuse by federal officials are difficult to prosecute. See also *Nwaokocha v. Sadowski*, 369 F. Supp. 2d 362 (E.D.N.Y. 2005) (addressing sovereign immunity, exhaustion under Prison Litigation Reform Act, limits on Federal Tort Claims Act, discretion of employees, limits on negligent claim).

<sup>468</sup>Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37-38 (2000) (footnote omitted).

And Professor Bernstein went on to point out:

Complaints filed in courts of law have been blamed for a kind of American national inferiority, featuring “anticompetitiveness,” stifling of innovation, enrichment of the wrong sort of lawyers, and a general malaise. A complainant who proceeds anyway to court will find the rhetoric hardened into statutory rules. Plaintiffs are barred, or they are discouraged by reforms like caps on compensatory damages (which can only hack crudely at the quantity of litigation rather than refine its effects and . . . impose extra burdens on women, disabled persons, and plaintiffs who do not currently hold paid employment), coerced sessions with expert panels (a reform commonly associated with medical malpractice, where complaints fare especially poorly), mandatory arbitration in fora that favor repeat players, harsh variations on the collateral source rule, narrow readings of statutes of limitation, revisions of common-law joint liability that enrich tortfeasors at the expense of injured people, and statutory reductions in the amount of punitive damages a successful litigant can recover. But in the aggregate they amount to suppression of complaints, and I believe that suppression of complaints is an important motive for their enactment.<sup>469</sup>

Private complaints, as Professor Bernstein indicates, in addition to permitting appropriate recoveries in courts, affirms transparency in law-making and participation in the development of law, adding an additional avenue for citizen participation in government.

Unnecessary barriers to court access already described are also detrimental to a pacific society.<sup>470</sup> Although the Federal Rules of Civil Procedure were “intended by their drafters to open wide the courthouse doors,”<sup>471</sup> judges have increasingly ignored their design “under the

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<sup>469</sup>*Id.* at 44.

<sup>470</sup>Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988).

<sup>471</sup>Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

guise of procedural efficiency.”<sup>472</sup> This trend “is misguided and shortsighted: it will burden the weak and the aggrieved unfairly, and it ultimately will undermine the legitimacy of the legal system.”<sup>473</sup> Such “procedural machinations” are particularly dangerous because they “quietly . . . have the effect of denying substantive rights, but without any of the procedural safeguards attached to public decision-making.”<sup>474</sup>

### Pleadings

One door-closing example is the Supreme Court’s new heightened pleading standard,<sup>475</sup> embodied in its 2007 decision, *Bell Atlantic Corp. v. Twombly*.<sup>476</sup> It “marks a clear and visible departure from the liberal federal pleading standards”<sup>477</sup> of Rule 8(a) of the Federal Rules of Civil Procedure. After *Twombly*, to survive a motion to dismiss a plaintiff must now plead

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<sup>472</sup>*Id.*

<sup>473</sup>*Id.*

<sup>474</sup>*Id.* at 1919-20 (citations omitted).

<sup>475</sup>*See, e.g.*, Adam H. Charnes & James J. Hefferan Jr., *Friendly to Corporations*, NAT’L L.J., Aug. 1, 2007, at 10 (easier for defendants to obtain prediscovery dismissals); Edward M. Spiro, *The Supreme Courts Pleading Trilogy*, Aug. 2, 2007, N.Y.L.J., at 3; Jonathan M. Hoff & Martin L. Seidel, *Impact of ‘Twombly’ on Notice Pleading*, N.Y.L.J., Sept. 13, 2007, at 3; Gregory P. Joseph, *Pleading Requirements*, NAT’L L.J., Sept. 3, 2007, at 13.

<sup>476</sup> 127 S. Ct. 1955 (2007).

<sup>477</sup> Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, NAT’L L.J., July 30, 2007; *see also* *Tellabs, Inc. v. Makor, Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (check against abusive litigation by exacting pleading requirements in securities litigation enacted by Congress and strongly enforced by courts); *ATSI Communications v. The Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007) (higher pleading rules together with denial of leave to amend); *see also* John C. Coffee, Jr., *Federal Pleading Standards After ‘Tellabs,’ ‘Bell Atlantic’*, N.Y.L.J., July 19, 2007, at 5 (cases are not significant departures from old rules on pleading); M. Norman Goldberger, Colleen F. Connelly & Justice M. Kasznica, *Courts Begin to Apply ‘Twombly’*, NAT’L L.J., Oct. 15, 2007, at S1 (“[F]ederal courts across the country have been revising pleading standards on

enough facts to state a claim to relief that is persuasive and plausible on its face. This plausibility requirement effectively overrules *Conley v. Gibson*'s venerable holding that a motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>478</sup> Although much of *Twombly*'s reasoning relates to antitrust litigation, federal courts have applied the new standard to evaluate the adequacy of pleadings in other kinds of cases.<sup>479</sup> The result—making "it easier for defendants to obtain prediscovery dismissal for failure to state a claim"<sup>480</sup>—deviates from the notice pleading standard of the Federal Rules and violates their spirit. A true "government for the people" should ensure that "the people" are able to freely access the courts and have a real opportunity to present their cases.

When the Federal Rules of Civil Procedure were first adopted in 1938,<sup>481</sup>

[T]hey were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through.<sup>482</sup> Litigants would have straightforward

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motions to dismiss in hundreds of cases").

<sup>478</sup>*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>479</sup>See Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, NAT'L L.J., July 30, 2007, at 3-4.

<sup>480</sup>Adam H. Charnes & James J. Hefferan Jr., *Friendly to Corporations*, NAT'L L.J., Aug. 1, 2007, at 1.

<sup>481</sup>See Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure are the Barriers to Justice Being Raised?* 137 U. PA. L. REV. 1901 (1988) (citing Henry P. Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307, 512 n.9 (1963)).

<sup>482</sup>Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944, 973 (1987).

access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter.<sup>483</sup>

Under the Federal Rule’s “short and plain” general pleading standards,<sup>484</sup> “the idea was not to keep litigants out of court but rather to keep them in.”<sup>485</sup> “The abandonment of strict pleading codes in favor of notice pleading, with issues to be fixed at pretrial and trial, combined with expanded discovery and broadened joinder rules, allowed judges to gather an entire controversy into one convenient package for rational presentation.”<sup>486</sup>

The drafters of the Federal Rules believed that the function of the pleading was not to *prove* the case.<sup>487</sup> Instead, the system was intended to “restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”<sup>488</sup> As the Supreme Court noted just five years ago, Rule 8(a)’s simple pleading standard “relies on liberal discovery rules and summary judgment motions to define

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<sup>483</sup>Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure And Erie*, 54 BROOK. L. REV. 1, 8 (1988).

<sup>484</sup>Fed. R. Civ. P. 8(a). *But see, e.g.*, Fed. R. Civ. P. 9(b) (fraud or mistake must be pleaded with particularity).

<sup>485</sup>*Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1976 (2007) (Stevens, J., dissenting).

<sup>486</sup>Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 10 (1988).

<sup>487</sup>*Twombly*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (citing Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937)).

<sup>488</sup>*Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

disputed facts and issues and to dispose of unmeritorious claims.”<sup>489</sup> Discovery devices, not motions to dismiss, serve to narrow and classify the basic issue between the parties and to obtain facts relating to those issues.<sup>490</sup>

It was in light of this history that the Supreme Court, in *Conley v. Gibson*, provided a standard for assessing the sufficiency of a complaint: “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>491</sup> In the following years, the Court continued to resist efforts to tighten pleading requirements and consistently reaffirmed its holding in *Conley*.<sup>492</sup>

This past term the Supreme Court “march[ed] resolutely”<sup>493</sup> away from its own precedents and design of the Federal Rules to heighten pleading requirements. As a result of *Twombly* and two following cases—*Erickson v. Pardus* and *Tellabs, Inc. v. Makor Issues &*

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<sup>489</sup>*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

<sup>490</sup>*Hickman*, 355 U.S. at 501.

<sup>491</sup>*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>492</sup>*See* *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting an effort “to craft a standard for pleading municipal liability . . .” by requiring that a plaintiff “state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.” (internal quotation marks omitted); *see also* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (holding that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.”). *But see Twombly*, 127 S. Ct. at 1969 (noting that the language of *Conley* has “puzzl[ed] the profession for 50 years,” and has been “questioned, criticized, and explained away long enough.”).

<sup>493</sup>*Id.* at 1988 (Stevens, J., dissenting).

*Rights*,<sup>494</sup> —it is now harder for a plaintiff to prevail because of increased pleading burdens.<sup>495</sup>

Although the Court “disclaimed any enhancement of the notice pleading requirements of Rule 8(a)(2),” limiting its ruling to security fraud cases, recent decisions based upon the decision have, in fact, “raised the pleading bar.”<sup>496</sup> Without providing a convincing rationale,<sup>497</sup>

*Twombly*’s “practical effect” is to overrule *Conley*—although the majority denied doing so.<sup>498</sup>

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<sup>494</sup>*Id.* at 1965 (holding that a claim under § 1 of the Sherman Antitrust Act must contain enough factual matter from which plausible grounds for an agreement could be inferred); *Erickson v. Pardus*, 127 S. Ct. 2197, 2198 (2007) (relying on its decision in *Bell Atlantic* and holding that allegations that prison officials violated the defendant’s rights and endangered his life by removing him from a hepatitis C treatment program were sufficient to satisfy the requirements of Rule 8(a)(2)); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504-05 (2007) (holding that allegations of scienter in a securities fraud action under the Private Securities Litigation Reform Act of 1995 must be at least as compelling as competing inferences).

<sup>495</sup>See Edward M. Spiro, *The Supreme Courts Pleading Trilogy*, N.Y.L.J., Aug. 2, 2007, at 3 (“[C]alling, at least in more complex cases, for more specificity from the plaintiff and a greater degree of involvement from the reviewing court than in the past.”).

<sup>496</sup>*Id.* at 3 (citing *Tellabs*, 127 S. Ct. at 2504-05) (requiring that allegations of scienter in a securities fraud action under the PSLRA not just be plausible, but in fact be cogent and at least as compelling as any opposing inference of nonfraudulent intent).

<sup>497</sup>The first reason provided by the majority in *Twombly* is that the language of *Conley* has “puzzl[ed] the profession for 50 years,” and has been “questioned, criticized, and explained away long enough.” *Twombly*, 127 S. Ct. at 1969. The Court’s second reason behind “expos[ing] deficiencies at the pleading stage was driven in part by the ‘enormous’ costs of discovery in modern antitrust litigation.” Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, NAT’L L.J., July 30, 2007. In dissent, Justice Stevens disputed both of these reasons, explaining that *Conley* “has been cited as authority in a dozen opinions of th[e] Court and four separate writings. In not one of those 16 opinions was the language ‘questioned,’ ‘criticized,’ or ‘explained away.’” *Id.* at 1978 (Stevens, J., dissenting). Justice Stevens further noted that such reasoning is in stark opposition to the Court’s previous observation that “in antitrust cases . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.” *Id.* at 1983 (quoting *Hosp. Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976)).

<sup>498</sup>Marcia Coyle, *Prevailing Winds: In the First Full Term With Alito, Court Took*

Under *Conley*, a complaint could not be dismissed unless the plaintiff could prove no set of facts which would entitle him to relief.<sup>499</sup> The new *Twombly* standard requires that plaintiffs plead “enough facts to state a claim to relief that is plausible on its face.”<sup>500</sup> Although the Court affirmed the “short and plain statement” requirement of Rule 8(a)(2), it then created a heightened standard, holding that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>501</sup> Whereas “any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings” under the *Conley* standard, *Twombly* requires that factual allegations “raise a right to relief above the speculative level”<sup>502</sup> and “possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”<sup>503</sup>

The Court’s main reason for imposing a plausibility requirement with “heft” was to help businesses “weed out baseless class actions and other litigation” and to lower costs.<sup>504</sup> The *Twombly* majority warned that one should not “forget that proceeding to antitrust discovery can be expensive” and that “the threat of discovery expense will push cost-conscious defendants to

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*Marked Conservative Turn*, NAT’L L.J., Aug. 1, 2007, at 2.

<sup>499</sup>*Conley*, 355 U.S. at 45-46.

<sup>500</sup>*Twombly*, 127 S. Ct. at 1974.

<sup>501</sup>*Id.* at 1964-65.

<sup>502</sup>*Id.* at 1964-65.

<sup>503</sup>*Id.* at 1966.

<sup>504</sup>Tony Mauro, *Roberts Court Takes a Pro-Business Stance*, N.Y.L.J., July 5, 2007, at 5.

settle even anemic cases.” Heightened pleading standards, therefore, will help “avoid the potentially enormous expense of discovery” for cases with (presumably) little merit.<sup>505</sup>

Although *Twombly* was an antitrust case, its new heightened pleading standard is far-reaching, and applies “more broadly to all civil cases, rather than only to claims of antitrust conspiracy.”<sup>506</sup> Only a month later the Supreme Court applied the *Twombly* framework to a pro se complaint in a Section 1983 suit against prison medical officials.<sup>507</sup> Lower courts increasingly apply the heightened standards, leading to more dismissals without a consideration of the merits.<sup>508</sup> Moreover, those complaints already subject to heightened pleading standards (such as those brought under Rule 9(b) or the Private Securities Litigation Reform Act of 1995)

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<sup>505</sup>*Twombly*, 127 S. Ct. at 1976.

<sup>506</sup>*Goldstein v. Pataki*, 488 F. Supp. 2d 254, 290 (E.D.N.Y. 2007) (applying the *Twombly* framework to an eminent domain case); *Iqbal v. Hasty*, 490 F.3d 143, 157-59 (2d Cir. 2007) (applying the *Twombly* framework to a qualified immunity case in which the complaint alleged that various government officials participated in or condoned unconstitutional actions taken in connection with holding the plaintiff, a Muslim Pakistani pretrial detainee, in administrative detention); *ATSI Communications v. The Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (“declin[ing] to read *Twombly*’s flexible ‘plausibility standard’ as relating only to antitrust cases.”).

<sup>507</sup>*Erickson v. Pardus*, 127 S. Ct. 2197 (2007); see Edward M. Spiro, *The Supreme Courts Pleading Trilogy*, N.Y.L.J., Aug. 2, 2007, at 3.

<sup>508</sup>See, e.g., *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 290 (E.D.N.Y. 2007) (applying the *Twombly* framework to an eminent domain case and granting defendant’s motion to dismiss); *Iqbal v. Hasty*, 490 F.3d 143, 157-59 (2d Cir. 2007) (applying the *Twombly* framework to a qualified immunity case in which the complaint alleged that various government officials participated in or condoned unconstitutional actions taken in connection with holding the plaintiff, a Muslim Pakistani pretrial detainee, in administrative detention); *Antongorgi v. Bovenia*, No. 06-CV-5777, 2007 WL 2126096, at \*4 (E.D.N.Y. July 24, 2007); *Taggart v. Moody’s Investor Service, Inc.*, No. 06-CV-3388, 2007 WL 2076980, at \*9 (E.D.N.Y. July 17, 2007).

will now “have to be evaluated under an even more demanding test.”<sup>509</sup>

The Court clearly envisions a more robust role for lower courts reviewing the sufficiency of pleadings in complex cases. The Court appears to be encouraging district courts to test more aggressively the plausibility of complicated claims at the earliest stage.<sup>510</sup>

As a result of the Supreme Court’s newly formulated standard, federal courts will now have to “delve more deeply into the specifics of any pleading,”<sup>511</sup> dismissing cases that might have ultimately been supported by discovery and a jury verdict. There is “no doubt that a material number of federal court litigants will now be denied the opportunity to use liberal discovery to flesh out the wrongs of which they complain.”<sup>512</sup> While the Federal Rules “struck the balance in favor of those who petitioned for redress of grievances, and somewhat shifted the burden onto those complained against to come into court and make a case,”<sup>513</sup> the balance now tilts more towards defendants.<sup>514</sup> With these decisions, the Supreme Court has effectively

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<sup>509</sup>Edward M. Spiro, *The Supreme Courts Pleading Trilogy*, N.Y.L.J., Aug. 2, 2007, at 4.

<sup>510</sup>*Id.* at 5.

<sup>511</sup>*Conceivable vs. Plausible*, N.J.L.J., July 23, 2007, at 3.

<sup>512</sup>*Id.*

<sup>513</sup>Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 24-25 (1988).

<sup>514</sup>*See Bell Atlantic*, 127 S. Ct. at 1989 (Stevens, J., dissenting) (“The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.”); *see also* Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, NAT’L L.J., July 30, 2007, at 4 (noting that defendants in complex federal cases “now have an important new precedent behind them when they seek to dismiss complaints.”); Adam H. Charnes & James J. Hefferan Jr., *Friendly to Corporations*, NAT’L L.J., Aug. 1, 2007, at 1 (noting that it will now be easier “for defendants to obtain pre-discovery dismissal for failure to state a claim.”).

created more barriers to access to the courts and has deviated from Lincoln’s idea of a representative government “for the people.”<sup>515</sup>

### Other Procedural Controls

Additional barriers to litigation have been erected, such as summary judgment. Professor Margaret Berger, as already noted, has demonstrated, for example, that the *Daubert* line of decisions, now embodied in Rule 702 of the Federal Rules of Evidence, while designed to provide some minimum threshold of reliability for expert testimony, is increasingly being used by trial and appellate courts to exclude helpful scientific evidence and then, because there is insufficient proof, to dismiss claims that should be decided by juries.

The jury has had much of its fact-finding authority attenuated indirectly through a variety of evolving procedural devices.<sup>516</sup> The increasing use of bench trials, *Daubert* hearings, summary judgments, and directed verdicts—as authorized by rules of practice and appellate courts—to limit jury fact-finding and set aside verdicts poses a threat to the continued viability of the Seventh Amendment jury trial.<sup>517</sup>

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<sup>515</sup>Edward M. Spiro, *The Supreme Court’s Pleading Trilogy*, N.Y.L.J. Aug. 22, 2007, at 3.

<sup>516</sup>Fed. R. Evid. 104(a) (judicial discretion to bar evidence that fails conditional relevancy); Fed. R. Evid. 403 (judicial discretion to bar cumulative, irrelevant, prejudicial information); Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury’s Province to Evaluate The Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 7 (2000) (*Daubert* may limit jury’s fact-finding role); Lisa S. Meyer, *Taking the “Complexity” Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U.L. REV. 337 (1993) (juries replaced by bench trials in complex cases).

<sup>517</sup>See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 A. L. REV. 139 (2007); Adam Liptak, *Cases Keep Flowing In, But the Jury Pool is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14 (“Jury trials may be expensive and time-consuming, but the jury, local and

Prematurely disposing of a case before the jury can consider it generally favors defendants, who do not have the burden of proof on most issues, leading not only to a violation of the Constitution, but to disfavoring injured plaintiffs.<sup>518</sup> Courts should be careful that this anti-jury-anti-plaintiff trend does not bar arguably deserving plaintiffs from relief.<sup>519</sup> Seldom must the judge protect against jury nullification detrimental to either party in a civil suit.<sup>520</sup>

Compared to the top-down administrative systems abroad, our is still largely a bottom-up lawyer and individual plaintiff-based litigation model, with a common law bias designed to

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populist, is a counterweight to central authority and is as important an element in the constitutional balance as the two houses of Congress, the three branches of government and the federal system itself.”). The battle of judges to control juries started in colonial times and explains, in part, diversity jurisdiction. See Robert L. Jones, *Finishing a Friendly Argument: The jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997 (2007).

<sup>518</sup>See, e.g., Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (“[Liberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.”); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Courts Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) (describing Supreme Court’s 1986 trilogy of summary judgment cases as “faulty and ill-conceived in light of the purposes for which the civil litigation system exists”); John Caher, *Court Seen As Slow In Expanding Tort Claims, Criminal Defendant’s Rights*, N.Y.L.J., Jul. 24, 2001, at 1 (describing trend against private litigants in decisions by New York Court of Appeals); Kevin M. Clermont & Theodore Heisenberg, *Appeal from Jury or Judge Trial: Defendants’ Advantage*, 3 AM. L. & ECON. REV. 125, 128 (2001) (appellate courts are more inclined to overturn plaintiff’s verdicts because of perceived pro-plaintiff bias by juries); Kevin M. Clermont & Theodore Heisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000) (same).

<sup>519</sup>See Stephen Landoman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993).

<sup>520</sup>See Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 JUDICATURE 168 (1998).

protect individual rights and property through private initiative and access to the courts.<sup>521</sup>

Restitution in criminal law, disgorgement in administrative law and a variety of legislative actions are gradually sapping this private approach.

We now have a powerful well-capitalized plaintiffs' bar which can advertise and assure equality in the courts.<sup>522</sup> But the balance is gradually shifting to pro defense connected establishments.

In cases such as *Agent Orange*, *DES*, asbestos, pharmaceutical, civil rights, school segregation, prison, cigarette, gun, social security, family abuse and other mass actions that I

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<sup>521</sup>Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833 (1998).

<sup>522</sup>*See, e.g.*, P. Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998) (arguing that the nineteenth century rejection in America of the English ban on contingent fees was driven by an egalitarian commitment to seeing that everyone have his day in court); *see also, e.g.*, Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy"* (Univ. S. Cal. L. Sch., Working Paper No. 05-7, 23, 2005):

Civil litigation, especially in the United States, with its broad rights of discovery and broad discretion to judges, is an extraordinary democratizing instrument. It extends to ordinary citizens the capacity that powerful entities can exercise, and to which tort reform concerns appear not to extend, to hold others to their legal duties. It is the only way that a housewife from New Jersey, for example, can make the President of American Airlines or the owner of the World Trade Center show up and answer questions about her husband's death, demanding information about what security screening procedures were followed or not and why, what fire safety measures were taken or not and why. In doing so, she does not rely on elected politicians to ask these questions for her: they may be uninterested, too busy, or face political penalties. Rather, she does it for herself. . . . The events of September 11, 2001 laid bare the foundations not only of the Twin Towers in downtown Manhattan but also of American ambivalence about a central democratic institution: the civil justice system. American democracy is built on the idea that ordinary individuals can participate in governance, taking action to ensure the laws are followed by activating and indeed to some extent directing the power of the state through the judicial branch.

have had, the intersection of substance and procedure is critical. Procedure profoundly affects rights-in-fact, particularly those of our less well situated Americans. Sometimes special problems, such as drug and family abuse, require a new form of integrated courts that combine civil, criminal, social services and mediation practice, but that does not justify closing traditional courts of general jurisdiction.

In current litigations in our rapidly changing technological, sociological and political world, what is required—in the absence of specific legislation—is a firm, yet sensitive, control of lawyers by the judiciary. Supervision by the courts when ethical issues arise—such as a fair division of group settlements among clients—and control to make sure that wider populations and classes are not adversely affected, is essential.

Sometimes legislatures have stepped in, as in the swine flu and child vaccine cases, to offer a fair “administrative” solution in special cases. Such legislative intervention is desirable in our democratic society. In most instances, however, judges have been left to balance these complex polycentric issues.

The class action as a device to equalize the litigation power of the many with small monetary, discrimination and other claims against powerful institutions—government and private—was an exciting American development of the last third of the twentieth century. It is now being strangled and neutered, largely because it was too effective in providing remedies against malefactors who would otherwise escape the law. As Professor John C. Coffee, Jr., and Stefan Paulovic of Columbia Law School sum up their comprehensive article, “The Future of Class Actions,” the “long-term future of the class action is in doubt . . . as a major form of

litigation practice.”<sup>523</sup>

The courts can control abuses without denying access. Judicial control can be exercised not only where the law explicitly requires it, as in class actions, but also in mass private individual settlements, such as in the recent *Zyprexa* pharmaceutical cases where I have limited attorneys fees and helped provide matrixes to deal with compensation on a mass basis—providing in effect a quasi class action. The vexing problems in *Zyprexa* of differing views of liens by the fifty states, private providers and the federal government for Medicaid, Medicare, worker compensation, and the like provide hurdles that can be overcome in conducting mass litigation without excessive transactional costs.

Cases such as *Zyprexa* or *Agent Orange* often require substantial ad hoc institutions. In *Zyprexa*, for example, the court relied upon a special master for discovery, four special masters to allocate individual recoveries to over 8,000 claimants on the basis of a matrix, an escrow bank, and a designated independent law firm to negotiate and administer lien allocations to the federal government, fifty states, Puerto Rico and the District of Columbia. In *Agent Orange* a national insurance company, social agencies in each of the states, and a special appeals master was utilized to distribute the settlement fund.

Yet, there must be something wrong with our system when cigarettes have allegedly killed millions due to fraudulent advertising, but the courts continue to resist procedures that would permit those who claim physical or economic injury to combine their claims by relying on the law of large numbers, modern statistical methods, epidemiology, and econometrics. The

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<sup>523</sup>John C. Coffee, Jr. & Stefan Paulovic, *The Future of Class Actions, Class Certification: Developments Over the Last Five Years 2002-2007*, CLASS ACTION LITIG. REPORT, Oct. 26, 2007, at S780, S787.

failures in consolidating cases for settlement and trial have led to unnecessary costs in asbestos and failures to use science effectively to curb unfair losses by defendants in breast implants and other cases. We can protect individual rights of both plaintiffs and defendants in mass litigations, do it cheaper, and do it faster than our courts do presently.

The charge that litigation is unfair or an increasing burden is, as already pointed out, unfounded. Professor Marc Galanter has found that the proportion of civil trials to civil dispositions fell from 11.5% in 1962 to 1.8% in 2002, part of a long historic decline. The reduction in proportion to population is also substantial.<sup>524</sup> It is unlikely that attorneys will expend the considerable funds and time on any unfounded case when the fee almost always depends upon a recovery.

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<sup>524</sup>See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004). Federal bench trials declined even more than jury trials. *Id.* at 567.

### VIII. “By” Requires Participation by the People Whenever Practicable

Lincoln assumed that the government would to be run “by” the people, as much as that is possible in a large democratic republic.<sup>525</sup> Controlling levers were provided by the vote, participation in institutions such as the jury, and exercise of the right to find out what is going on, to speak freely, to assemble and to petition for redress.

#### Juries

Service as jurors is the way many lay people participate in government in a direct and meaningful way.<sup>526</sup> It ensures that the legal system is grounded in reality. In New York, Chief Judge Judith Kaye has insisted that juries be broadened by eliminating excuses, even of judges.<sup>527</sup>

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<sup>525</sup>Celia W. Dugger, *World Bank Report on Governing*, N.Y. TIMES, July 11, 2007, at A6 (United States citizens’ voices as measured by elections, press freedom and civil liberties is highest, but decreasing); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2006* (World Bank Pol’y Research, Working Paper No. 4280, July 2007), available at <http://ssrn.com/abstract=999979>; WORLD BANK, A DECADE MEASURING THE QUALITY OF GOVERNANCE (2007).

<sup>526</sup>Tyrone Richardson, *Jury Duty Stamp is Unveiled in Manhattan*, 238 N.Y.L.J. Sept. 13, 2007, at 1 (“According to court officials, about 5.6 million people report for jury duty in the United States every year. In New York state, more than 600,000 people reported for jury duty last year. New York jurors earn \$40 a day, a higher wage in comparison to the national average of \$22.63 per day.”).

<sup>527</sup>Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, 78 N.Y. St. B.J., Oct. 2006, at 10. *But see* Jack B. Weinstein & Elizabeth A. Nowicki, *Expanding the Judge’s Power Over Jury Selection With The New Test of Inferable Bias*, N.Y. ST. B.A. CRIM. J., Winter 1998, at 6 (criticizing a holding from the Court of Appeals for the Second Circuit increasing reasons for excluding potential jurors). The Eastern District of New York Jury Selection Plan, adopted as amended on September 12, 2006, relies on voting and automobile registration lists and thus excludes many poor people who neither vote nor own cars. Many also cannot afford to serve.

The ancient history of the jury,<sup>528</sup> the British Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown,<sup>529</sup> the Declaration of Independence,<sup>530</sup> and the Constitution,<sup>531</sup> all emphasize the importance of this institution to our own (but not foreign nations’) freedoms. Like most trial judges, I have the greatest respect for the power, competence and devotion of our juries. I believe they can effectively deal with sprawling contemporary problems, even those in complex class actions like *Agent Orange* and *Zyprexa*.<sup>532</sup>

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<sup>528</sup>See Andrew J. Parmenter, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 380 (“The power of juries . . . can be traced back to courts established before the Magna Carta. These early courts were described as ‘courts of conscience,’ when juries acted as both judge and jury, deciding cases not according to the laws of the king, but according to their own sense of justice.”).

<sup>529</sup>MICHAEL BARONE, THE REMARKABLE BRITISH UPHEAVAL THAT INSPIRED AMERICA’S FOUNDING FATHERS 272 (outlawing excessive bail, fines, and cruel and unusual punishments; “jurors ought to be duly impannelled and returned”).

<sup>530</sup>THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (“For depriving us in many cases, of the benefit of Trial by Jury”).

<sup>531</sup>U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”); U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). As Professor Jones points out, the jury’s authority was greater than the judges in the early American period, with power in some states to decide law and fact. See Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1026 ff. (2007).

<sup>532</sup>See, e.g., *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (2006) (“Powerful factors should be kept in mind: . . . the jury’s constitutional role and its vast discretion in evaluating evidence in a civil suit of this kind under Amendment VII of the United States Constitution. The jury’s power and capacity to deal with complex facts and come to a reasonable resolution of a dispute should not be underestimated.”); *id.* at 1135 (“The jury’s fact-

Open courts, operated with juries as ultimate deciders, are foundational in our system of government by the people. Essential to the kind of jury guaranteed by our Constitution and the Gettysburg Address’s ideal of judgment “by the people,” are two important requirements relevant today: first, that the jury represent a fair cross-section of the community, not just a select few; and, second, that the delicate balance of power between jury and judge be maintained against judicial incursion.

The courts have rightly devoted a great deal of attention in recent years to providing a full cross-section of the community for our juries.<sup>533</sup> We have made great progress over the last half-century in citizen participation in juries. Yet, because of shifts of power to the judges—and despite the Supreme Court’s new emphasis on “the power of the jury” in sentencing—the balance of control has tipped decidedly away from juries in favor of judges, and away from what the Founders envisaged and what is good for our democracy.

### Jury Selection

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finding and credibility-determining abilities—the skills that our legal system relies on juries to provide—can evaluate and integrate most expert testimony. A bent towards exclusion to permit the court to take the case away from the jury is frowned upon.”); *see also, e.g.*, RESTATEMENT (THIRD) OF TORTS: JUDGE & JURY § 8 (Tentative Draft Nos. 1 & 8, 2001). *But see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, at xxi (Tentative Draft No. 5, (Apr. 4, 2007) (Reporter’s Memorandum) (“There is a recurring (and new) theme in these materials: the use of arbitrary lines to limit recovery for emotional disturbance”).

<sup>533</sup>*See* *Smith v. Texas*, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.”).

In considering the role of the jury, we need to bear in mind that our judges are successful people. Most of us have a rather sheltered background, having come up through college and graduate law school and the political system from the middle class. Our friends are rich. Our contact with the working poor is limited.<sup>534</sup> It is to the diverse cross-section of the community constituting our juries that we must turn for knowledge of how life operates outside our courthouses and our social circle. This is particularly true in certain kinds of cases. In discrimination cases,<sup>535</sup> for example, it is particularly important to bring to bear the knowledge and common sense of the jury in evaluating what is the difference between gender

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<sup>534</sup>United States v. Khan, 325 F. Supp. 2d 218, 220 (2004) (“[A] judge is often unlikely to possess detailed knowledge or appreciation of the defendant’s background with its subtle cultural and linguistic characterizations—usually so different from the court’s: high status, relatively large income, assured medical care, well-to-do friends in high places, and the skills to take advantage of the system and to avoid its pitfalls.”).

<sup>535</sup>See Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998) (“A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees’ dignity might require standards higher than those of the street. . . . The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications.”); Nicholls v. Brookdale Univ. Hosp. & Med. Ctr., No. 03-CV-6233 (JBW), 2005 U.S. Dist. LEXIS 12582 (E.D.N.Y. June 22, 2005) (“In discrimination cases, the inquiry into whether the plaintiff’s sex (or race, etc.) caused the conduct at issue often requires an assessment of individuals’ motivations and state of mind, matters that call for a ‘sparing’ use of the summary judgment device because of juries’ special advantages over judges in this area.”) (quoting Brown v. Henderson, 257 F.3d 246, 251-52 (2d Cir. 2001)). *But cf.* Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. POL’Y REV. 239 (2007) (addressing the subject of those jurors who also happen to be experts in a field related to the issue being tried).

discrimination and a convivial relationship between men and women in working places.<sup>536</sup> One thinks of Plato's reference to the cave, where as we go higher in the court structure, we go deeper into the cave, observing real life through less sharp shadows thrown on the walls.<sup>537</sup>

As short a time ago as when I became a judge, jury panels were typically selected from "keymen"<sup>538</sup> by the clerk of the court. That meant that minorities, women, and the poor were largely excluded. In a series of cases relying heavily upon statistical analysis,<sup>539</sup> the Supreme

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<sup>536</sup>See *Gallagher v. Delaney*, 139 F.3d 338, 342-43 (2d Cir. 1998) ("Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation. . . . [T]he dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases. In this period of rapidly changing and conflicting views of appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment.").

<sup>537</sup>Much of my work in tobacco, asbestos, gun, Zyprexa and other mass litigations is based upon the assumption that the jury can decide these complete cases. See, e.g., *In re Zyprexa Prod. Liab. Litig.*, 493 F. Supp. 2d 571 (E.D.N.Y. 2007) (denying defendant's motion for summary judgment in a complex tort litigation).

<sup>538</sup>Keymen were selected by the Clerk of the Court from leading citizens of the district. See Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshal and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 167 (1988); see also Robert Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1064 ff. (2007) (federal juries picked by United States Marshals).

<sup>539</sup>*Batson v. Kentucky*, 476 U.S. 79, 89 (1986) ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges . . . , the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race") (citations omitted); *Edmonson v. Lessville Concrete Co., Inc.*, 500 U.S. 614 (1991) (expanding *Batson* to apply to private civil litigation); *Georgia v. McCullum*, 505 U.S. 42 (1992) (holding that criminal defendants may not exercise peremptory challenges in a discriminatory manner because prospective jurors have a right to be free from discrimination in jury selection); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to apply to gender-based discrimination). But see Jack B. Weinstein & Elizabeth A. Nowicki, *Expanding the Judge's Power Over Jury*

Court as well as statutes and practice now require that adults be selected without discrimination.<sup>540</sup> The Supreme Court has accomplished much by requiring that jurors be selected from a diverse pool and by prohibiting litigants from striking jurors for discriminatory reasons.

The Federal District Court for the Eastern District of New York uses voting and motor vehicle registration lists to select jury panels.<sup>541</sup> That process tends to exclude the homeless and the working poor who lack cars and often do not vote. Broadening is needed, as by using public benefit lists. We also tend to excuse those jurors who depend upon their daily work for income, including, for instance, taxi drivers who cannot afford to give up a day's work. Despite Chief Judge Judith Kaye's admirable efforts to increase diversity among our jurors, higher jury fees

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*Selection With The New Test of Inferable Bias*, N.Y. ST. B.A. CRIM. J., Winter 1998, at 6 (criticizing the Court of Appeals for the Second Circuit's increase of reasons for exclusion).

<sup>540</sup>*See, e.g.*, N.Y. JUDICIARY LAW § 500 (McKinney 2003) ("It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community"); IND. CODE § 35-46-2-2 (West 2004) ("A public servant having the duty to select or summon persons for grand jury or trial jury service who knowingly or intentionally fails to select or summon a person because of color, creed, disability, national origin, race, religion, or sex commits discrimination in jury selection, a Class A misdemeanor."); MD. COURTS ANN., COURTS & JUDICIAL PROCEEDINGS § 8-102(b) (West 2006) ("A citizen may not be excluded from jury service due to color, disability, economic status, national origin, race, religion, or sex."); MICH. COMP. LAWS § 2.511(F)(1) (West 2007) ("No person shall be subjected to discrimination during voir dire ON the basis of race, color, religion, national origin, or sex.").

<sup>541</sup>The Eastern District of New York Jury Selection Plan, adopted as amended September 12, 2006. The Eastern District has also followed the lead of Judith Kaye, Chief Judge of the New York Court of Appeals, who has insisted that juries be broadened to include the managerial and professional classes—including even judges—who once avoided jury duty by eliminating all automatic jury exemptions. *See* Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, 78 N.Y. St. B.J., Oct. 2006, at 11-12.

are required,<sup>542</sup> as well as legislation requiring employers of substantial numbers of people to pay jurors what they will lose while they are on jury service.<sup>543</sup>

*Batson v. Kentucky*

In *Batson v. Kentucky*, the Supreme Court addressed the use of racially discriminatory peremptory strikes by prosecutors, holding that they constituted a denial of equal protection.<sup>544</sup> Eight years later in *J.E.B. v. Alabama*, the Court applied the same reasoning and established the same test for discriminatory sex-based peremptory strikes.<sup>545</sup>

*Batson*'s three-step burden shifting process has substantially improved jury selection, although federal review of state-court *Batson* challenges through habeas corpus<sup>546</sup> is almost

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<sup>542</sup>Tyrone Richardson, *Jury Duty Stamp is Unveiled in Manhattan*, N.Y.L.J. Sept. 13, 2007, at 1 (“New York jurors earn \$40 a day, a higher wage in comparison to the national average of \$22.63 per day.”).

<sup>543</sup>N.Y. JUDICIARY LAW § 521(a)-(b) (McKinney 2003) (“[T]rial and grand jurors in each court of the unified court system shall be entitled to an allowance equal to the sum of forty dollars per day” except if the juror’s “wages are not withheld on account of such service.”). This became effective on February 15, 1998. 3d Jud. Dist., Jury Updates—Reforms and Improvements (2005), <http://www.nycourts.gov/courts/3jd/jury/juryupdates.shtml>; see also N.Y. JUDICIARY LAW § 519 (McKinney 2003) (forbidding employers from firing employees called to serve as jurors but allowing employers to “withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first forty dollars of such juror’s daily wages during the first three days of jury service.”).

<sup>544</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>545</sup> *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>546</sup>See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (holding that Certificate of Appealability should have been granted because reasonable jurists could have debated a federal habeas petitioner’s *Batson* claim).

impossible to fairly resolve on the usual reconstructed state record.<sup>547</sup> A more representative and less tainted jury would probably be obtained were peremptory challenges abolished in favor of more flexible “for cause” challenges to be ruled on by the judge.

### Death Qualifying

Dismissals for cause based on jurors’ beliefs still result, especially in death penalty cases, in biased jury panels. The Supreme Court’s recent decision in *Uttecht v. Brown*, a capital case, has decreased the chances of a fairly selected cross-section of the community participating in these important cases as jurors.<sup>548</sup> In *Uttecht*, the Court held that the trial judge did not abuse his discretion by dismissing a juror for cause after finding that the juror’s ability to impose the death penalty was substantially impaired. The juror was dismissed—even though he indicated that he would follow the law as instructed by the judge. Such a juror tends to be biased towards the defense. Doubts about the death penalty have recently increased due to general knowledge of DNA exonerations, and today it may take weeks for a judge to “death qualify” a jury because so many from the “fair cross section of the community” harbor serious reservations about the death penalty. As long as a juror credibly states that he or she will follow the law as instructed by the judge, the juror should not be disqualified.

### Juror Nullification

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<sup>547</sup>*See, e.g., Sorto v. Herbert*, 497 F.3d 163, 170-71 (2d Cir. 2007) (series of *Batson* challenges with unclear record); *Richardson v. Greene*, 497 F.3d 212, 218-19 (2d Cir. 2007) (*Batson* claim unreviewable on federal habeas corpus due to procedural default); *People v. Luciano*, 840 N.Y.S.2d 589, 589 (N.Y. App. Div. 1st Dep’t 2007) (“[W]e cannot endorse the forfeiture of improperly used peremptory strikes as a penalty for a *Batson* or reverse-*Batson* violation.”).

<sup>548</sup>*Uttecht v. Brown*, 127 S. Ct. 2218 (2007).

In spite of the recent trend towards discharging jurors who may nullify<sup>549</sup>—a particular problem with the selection of jurors in capital cases—I am hesitant to dismiss intelligent prospective jurors. “Nullification occurs when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilty.”<sup>550</sup>

Concerns about jury nullification are largely unwarranted.<sup>551</sup> Differences about evaluation of the facts based on differing life experiences ought not to be mistaken for nullification.<sup>552</sup>

There is some tendency to nullify based on conscience or individual circumstances in the face of laws a juror believes to be unjust.<sup>553</sup> In my courtroom, I do “not instruct juries on the power to nullify or not to nullify. Such an instruction is like telling children not to put beans in

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<sup>549</sup>See Andrew J. Parmenter, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 402-410 (citing cases).

<sup>550</sup>See Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239, 239 (1993).

<sup>551</sup>There are other far more predominant forms of nullification in our law enforcement system, such as prosecutors deciding not to bring charges (or police officers deciding not to arrest) for marijuana possession—not to mention the presidential commutation of Scooter Libby’s sentence. *See id.*

<sup>552</sup>Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 JUDICATURE 168, 169 (1998). “Our increasing diversity may result in more hung juries due to culturally rooted semantic distinctions and different understandings of how the real world operates. This phenomena may be unwittingly misunderstood as race-based nullification, since it is rooted in jury diversity.” *Id.* at 170. “Where jury nullification is a problem, an alarm bell should sound. An effective jury system requires that all our people feel fairly treated in court as jurors, and in society as individuals.” *Id.* at 171.

<sup>553</sup>See Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239 (1993).

their noses. Most of them would not have thought of it had it not been suggested.”<sup>554</sup> I do believe, however, that judges “can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values.”<sup>555</sup> Judge Bazelon was correct when he wrote,

I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must reexamine a great deal more than just the nullification doctrine.<sup>556</sup>

#### Neutralization of Juries Through Control by Judges

Because judgment “by the people” in the form of the jury is so important to our democracy, I have opposed the trend towards minimizing the power of the jury, whether through judicial control<sup>557</sup> over jurors by, for example, summary judgment and jury instructions,<sup>558</sup> or

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<sup>554</sup>*Id.* at 239.

<sup>555</sup>*Id.* at 241.

<sup>556</sup>*United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting).

<sup>557</sup>“Put simply, the right to be tried by a jury of one’s peers finally exacted from the king would be meaningless if the king’s judges could call the turn.” *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969).

<sup>558</sup>*See* B. Michael Dann, “*Must Find the Defendant Guilty: Jury Instructions Violate the Sixth Amendment*,” 91 JUDICATURE 12 (2007) (a “survey of the states’ and federal circuits’ corresponding jury instruction language reveals that 24, almost 40 percent, of state courts and federal circuits use the command ‘must’ or its equivalent (‘shall’ or ‘duty’) to direct juries to verdicts of guilty when all of the elements of the alleged crime have been proven. Another 7, or 13 percent, use the milder admonition ‘should’ to steer the jury’s decision to guilt.”). *Also see* *United States v. Orena*, 811 F. Supp. 819, 825 (1992) (“Potential unfairness to the government due to the possibility of jury nullification can be foreclosed. A proper charge directs the jury that it is obligated to apply the law, as explained to it by the court, fairly and impartially to the facts as it finds them. The government is entitled to no less and no more.”).

congressional control through the sentencing guidelines and mandatory minimum sentences.

Jury instructions should be as short and simple as possible.<sup>559</sup> “As Francis Bacon put it in instructing a judge assuming his duties: ‘That you be a light to the jurors to open their eyes, but not a guide to lead them by the nose.’”<sup>560</sup>

In its *Apprendi-Booker* line of cases, the Supreme Court has emphasized the role of the jury as the spinal column of our democracy.<sup>561</sup> Justice Scalia’s analysis of sentencing guidelines, while arguably based on questionable historical analysis of colonial jury power, had an unforeseen beneficial effect. That is, it provided the basis for ultimately permitting a split Court to make sentencing guidelines in the federal court permissive rather than mandatory.<sup>562</sup>

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<sup>559</sup>Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 162 (1988) (“Judges know that use of dry, generic form charges copied from chargebooks reduces the risk they will be reversed. But this practice often dilutes the jury instruction to incomprehensible boilerplate when what is required is genuine communication with jurors.”). Mandatory minimums circumscribe the power of both judges and juries, the latter because they may wish to convict while leaving punishment to the judge’s discretion.

<sup>560</sup>*Id.* at 163 (quoting Francis Bacon).

<sup>561</sup>*See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment requires a jury to find any such fact that increases the penalty for a crime beyond the statutory minimum beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584 (2002) (extending the *Apprendi* rule to capital punishment: a judge, sitting without a jury, may not find an aggravating circumstance necessary to impose the death penalty); *Blakely v. Washington*, 542 U.S. 296 (2004) (applying *Apprendi* to hold Washington State’s mandatory sentencing guidelines unconstitutional); *United States v. Booker*, 543 U.S. 220 (2005) (holding the federal sentencing guidelines unconstitutional as applied); *see also Cunningham v. California*, 127 S. Ct. 856 (2007) (holding that under California’s determinate sentencing law, dispositive fact-finding is for jury).

<sup>562</sup>*See United States v. Khan*, 325 F. Supp. 2d 218 (2004) (“[T]he jury’s participation in sentencing has deep roots in this country’s history and may be incorporated in the constitutional right to a jury trial. Experience with juries suggests that use of a jury in sentencing, even after a plea of guilty or in a second phase of a trial on the merits, is feasible. It is the mode in capital

*Booker*, however, has had practically no effect, in my experience, in enhancing the role of the jury in sentencing. Repeatedly, I give a defendant who pleads guilty the right to have a jury pass on enhancing factors and it is invariably rejected.<sup>563</sup>

The use of summary judgment also allows judges to limit the jury's power. There has been an enormous expansion in the use of summary judgment to control juries.<sup>564</sup> Today, either or both parties request it in about seventeen percent of cases; summary judgment is granted in about nine percent.<sup>565</sup>

Summary judgment was the central issue in *Scott v. Harris*,<sup>566</sup> a 2007 case in which a Supreme Court majority intervened against jury power. In *Scott*, a policeman forced the plaintiff off the road during a car chase. As a result, the plaintiff became a paraplegic, and sued the officer. The district court and the Court of Appeals rejected a motion for summary judgment and a motion to dismiss based upon the defendant's qualified immunity. Both courts held that

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cases . . .”).

<sup>563</sup>*See id.* at 224 (“Defendants simply cannot resist the prosecutors’ offers of guaranteed low punishments.”).

<sup>564</sup>*See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); Adam Liptak, *Cases Keep Flowing In, But the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14 (“Jury trials may be expensive and time-consuming, but the jury, local and populist, is a counterweight to central authority and is as important an element in the constitutional balance as the two houses of Congress, the three branches of government and the federal system itself.”). *But see* Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts* (1st Annual Conference on Empirical Legal Studies Paper 2007), available at <http://ssrn.com/abstract=914147>.

<sup>565</sup>Adam Liptak, *Cases Keep Flowing In, But the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14.

<sup>566</sup>*Scott v. Harris*, 127 S. Ct. 1769 (2007).

the issue of whether the plaintiff's actions had risen to a level warranting deadly force was a question of fact reserved for a jury. In an opinion written by Justice Scalia, the Supreme Court, with only one full dissent (and a number of concurrences), relied upon the Court's viewing of a video recording of the event taken from the police car, and held that the officer had acted reasonably.<sup>567</sup> This was an almost unprecedented effort to displace the fact-finding power of the jury. In dissent, Justice Stevens reviewed the case from the viewpoint of a reasonable juror who would know the local roads and driving patterns and who would bring to the case a driver's experience. Justice Stevens plausibly concluded that many reasonable jurors<sup>568</sup>—and some judges<sup>569</sup>—might view the officer's conduct to be at least strikingly careless and would hold him

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<sup>567</sup>*Id.* at 1775 (“[W]hat we see on the video more closely resembles a Hollywood-style car chase”).

<sup>568</sup>*Id.* at 1784-85 (2007) (Stevens, J., dissenting) (“Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to ‘view the facts in the light depicted by the videotape’ and implies that no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified. However, the three judges on the Court of Appeals panel apparently did . . . If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.”).

<sup>569</sup>One appellate judge suggested his own rejection of the jury's good sense and our constitutional reliance on it in *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007). In *Husain*, both the trial court and the appellate court agreed that newspaper editors of a college newspaper had their free speech rights violated by a college president; the only issue was whether there was qualified immunity. *Id.* at 120, 131-32. The trial judge granted qualified immunity and dismissed. *Id.* at 131. A majority of the Court of Appeals panel disagreed. *Id.* Dissenting, the Chief Judge would have dismissed, rejecting a possible jury view because, as he put it: “This is a case about nothing,” “a silly thing,” based upon “the plaintiffs' fantasy of oppression,” and the plaintiff's editorial “illiterate piffle;” *id.* at 138, and a verdict for plaintiffs is possible because “anything is possible with a jury.” *Id.* (concurring in part and dissenting in part).

liable.

Courts can facilitate participation in their government by empowering diverse juries and protecting them from judicial encroachment. A more direct way of continuing participation is through the vote, the subject to which I now turn.

### Voting

The courts have done well in opening up primaries and voting generally to all voters. They have tried to some degree to enforce the mid-twentieth century congressional policies to improve access of all to the voting booth.<sup>570</sup> But our efforts to fully democratize voting still fall far short of the Lincoln goal.

It is a judge's responsibility to stand guard, both outside and inside the polling booth to protect voters' rights and power. To paraphrase Chief Justice Warren's conclusion in his Cardozo Lecture: it is not merely enough to open the voting booth doors to everyone. The practice surrounding the casting of vote—like voter identification, voting machinery, and ballot comprehensibility—as well as the proceedings beforehand, like voter registration and candidate ballot access must be guarded. Voting must be open on equal terms to all if word “democracy” is to command the respect we claim for it.<sup>571</sup>

Politicians who benefit from restricted voting rights and the status quo have little motivation to encourage voting by those who may not support them. Given the United States Department of Justice's alleged new proclivity to grant pre-clearance to questionable anti-voting

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<sup>570</sup>See 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 931-36 (3d ed. 2000).

<sup>571</sup>*Cf.* Earl Warren, Chief Justice, U.S. Supreme Court, All Men Are Created Equal, The Benjamin N. Cardozo Memorial Lecture (1970), in 2 THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BENJAMIN N. CARDOZO MEMORIAL LECTURES 938 (1995).

procedures, the courts must, now more than ever, act as guardians of our participatory democracy. The United States Commission on Civil Rights can no longer be depended on to protect minority voting rights.<sup>572</sup> It has become increasingly difficult for courts to actively enforce voting rights because of recent Supreme Court decisions limiting gerrymandering challenges,<sup>573</sup> redefining and diluting the effect and purpose standard of Section 5 of the Voting Rights Act,<sup>574</sup> and invalidating campaign finance laws.<sup>575</sup>

Some ten years ago, I characterized our nation's history as "[a] vast surging tide towards full voting rights," illuminated by the "shining principle of one person, one vote."<sup>576</sup> I noted that

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<sup>572</sup> See Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, BOSTON GLOBE, Nov. 6, 2007 (Bush appointees changed voter registration before appointment to give the Civil Rights Commission a 6-2 Republican majority; no longer protects minority voter rights).

<sup>573</sup> See, e.g., *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2612 (2006) ("We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge."); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) ("[W]e must conclude that political gerrymandering claims are nonjusticiable").

<sup>574</sup> See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 477-79 (2003) (redefining and diluting the Section 5 effect standard); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 330-31 (2000) (purpose standard).

<sup>575</sup> *Federal Election Comm'n v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007) ("We conclude that the speech at issue in this as-applied challenge is not the 'functional equivalent' of express campaign speech"). See generally Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1415 ff. (2007) (describing "Pathologies of unaccountability," including partisan gerrymandering, control of primaries by two major parties, "dominance of political money," disenfranchisement of "socially marginal groups," gambits to "exclude voters of color," photo identification and intimidation and interference with voters "who might oppose the status quo," disenfranchisement of 13% of Black men (1.4 million), and noting the need to depend upon Constitution, not elected officials, for reforms).

<sup>576</sup> *Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.*, 158 F.3d 92, 109 (2d Cir. 1998)

we have come a long way from when the franchise was regarded as the rightful possession of the most privileged and wealthy in our society and limited in virtually every colony to White, Protestant, male, property-holding individuals. This country's first president was elected by a mere six percent of the American population.<sup>577</sup> Earlier, in *Kramer v. Union Free School District*, I insisted that all residents, not merely property owners or those with children in school, be permitted to vote in school board elections.<sup>578</sup>

Over the past two hundred plus years, we have:

[S]teadily expanded the right to vote to include larger and larger classes of Americans citizens. . . . [B]oth the states and the federal government have stripped away those restrictions which once limited suffrage to a privileged minority.<sup>579</sup> The United States Constitution has been amended repeatedly in order to remove voting restrictions based on race, sex, place of residence, wealth, and age.<sup>580</sup>

Congress forbade state voting schemes having discriminatory impact by enacting and reenacting the Voting Rights Act of 1965. The Supreme Court took a leading role in enlarging

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(Weinstein, J., dissenting).

<sup>577</sup>*Id.* at 117.

<sup>578</sup>*Kramer v. Union Free School Dist. No. 15*, 282 F. Supp. 70, 76 (E.D.N.Y. 1968) (three judge court) (Weinstein, J., dissenting), *rev'd*, 395 U.S. 621 (1969).

<sup>579</sup>See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1776-1860* 272 (1960) (describing “gradual removal of property and taxpaying qualifications for voting in a majority of the states” during nineteenth century).

<sup>580</sup>*Kessler*, 158 F.3d at 117 (Weinstein, J., dissenting) (citing U.S. CONST. amend. XV (forbidding all voting restrictions based on “race, color, or previous condition of servitude” (ratified 1870)); U.S. CONST. amend. XIX (forbidding voting restrictions based on sex (ratified 1920)); U.S. CONST. amend. XXIII (granting District of Columbia residents the right to vote in presidential elections (ratified 1961)); U.S. CONST. amend. XXIV (eliminating poll tax in federal elections (ratified 1964)); U.S. CONST. amend. XXVI (forbidding restrictions based on age for those citizens over eighteen years old (ratified 1971))).

voter ranks to encompass almost every adult American, abolishing the “white primaries” in the South,<sup>581</sup> poll taxes,<sup>582</sup> at-large districts,<sup>583</sup> and many other discriminatory devices designed to restrict voting impact, especially of minority citizens.<sup>584</sup>

Although our voting booths are finally now open to *most* Americans, they have never been, as a practical matter, open to everyone. Millions of felons and ex-felons—predominantly African Americans and other minorities—cannot vote and many will never be able to vote even after they have served their sentences. The “vast surging tide” of voting rights has perceptibly ebbed.

With the imposition of new identification requirements (precleared by the Department of Justice), our polling places across the country are beginning to be blocked to a disproportionate number of the poor. Despite repeated attempts at election finance reforms, the ability of those

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<sup>581</sup>Smith v. Allwright, 321 U.S. 649, 665-66 (1944) (striking down the “White primary” as violating the Fifteenth Amendment’s prohibition against voting discrimination based on race); Terry v. Adams, 345 U.S. 461, 470 (1953) (holding unconstitutional “Pre-primary” elections conducted by private associations (from which African Americans were excluded) to select candidates for the Democratic primaries).

<sup>582</sup>Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down state poll tax as a violation of Equal Protection Clause); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 633 (1969) (invalidating state law which limited the right to vote in school board election to property owners and those with school-age children), *rev’g* 282 F. Supp. 70 (E.D.N.Y. 1968) (3 judge panel in which I dissented).

<sup>583</sup>White v. Regester, 412 U.S. 755, 769-70 (1973).

<sup>584</sup>Our civil rights history is fascinating, but beyond the scope of these notes. *See, e.g.*, David A. Nichols, *Ike Liked Civil Rights*, N.Y. TIMES, Sept. 12, 2007, at A21 (noting that President Eisenhower’s desire to expand voting rights in 1960 was opposed by Lyndon Johnson who at the time preferred a cosmetic approach). *But see* Robert A. Caro, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 918 (2002) (suggesting that President Eisenhower did not know the details of the Civil Rights Act of 1957).

who have undue power and money to leverage their influence on elections has diminished the power of the average voter and diluted our still shining—but somewhat tarnished—principle of “one person, one vote.”

Lincoln would approve the proposition that “power to vote is respected as a ‘fundamental right’ under the Fourteenth Amendment of the Constitution. . . . [and as a] basic right by international consensus.”<sup>585</sup> The “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>586</sup> “Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of” our entire democracy.<sup>587</sup>

Consequently, courts must subject “[s]tate or federal efforts to abridge or deny the voting rights of citizens . . . to the strictest constitutional scrutiny.”<sup>588</sup> “Especially since the . . .

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<sup>585</sup> *Kessler v. Grand Cent. Dist. Mgmt. Ass’n, Inc.*, 158 F.3d 92, 118 (2d Cir. 1998) (Weinstein, J., dissenting) (citing *Reynolds v. Sim*, 377 U.S. 533 (1964), Article 21 of the Universal Declaration of Human Rights, which requires that “genuine elections which shall be [held] by universal and equal suffrage,” Article 25 of the International Covenant on Civil and Political Rights which requires “universal and equal suffrage,” Article 23(b) of the American Convention on Human Rights, which requires “universal and equal suffrage,” and Article 20 of the American Declaration of the Rights and Duties of Man, which requires that “[e]very person having legal capacity is entitled to participate in the government of his country . . . and to take part in popular elections. . . .”).

<sup>586</sup> *Reynolds*, 377 U.S. at 55.

<sup>587</sup> *Kramer v. Union Free Dist. No. 15*, 395 U.S. 621, 626 (1969).

<sup>588</sup> *Kessler v. Grand Cent. Dist. Mgmt. Ass’n, Inc.*, 158 F.3d 92, 118 (2d Cir. 1998) (Weinstein, J., dissenting) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[W]hen [First and Fourteenth Amendment rights] are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” (internal citations omitted)).

franchise . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>589</sup> As the Supreme Court has observed,

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.<sup>590</sup>

It is this conclusion that led the Supreme Court to establish our foundational one person, one vote standard.<sup>591</sup>

#### Equalization of the Vote

“Concomitant with the expansion of the franchise [over the last two centuries] has come a recognition that those who enjoy the right to vote must have their votes accorded equal weight with those of other voters.”<sup>592</sup>

Through its one person, one vote decisions, the Court has eliminated much of the discrimination in voting power by outlawing what was essentially a rotten borough system. Ensuring “one person, one vote” has been, and is, no easy task given the complexity of our political process and structure. In *Wesberry v. Sanders*, the Court held that congressional

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<sup>589</sup>Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (internal quotation marks and citation omitted).

<sup>590</sup>Wesberry v. Sanders, 376 U.S. 1, 17-18 (1963).

<sup>591</sup>See Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

<sup>592</sup>Kessler v. Grand Cent. Dist. Mgmt. Ass’n, Inc., 158 F.3d 92, 119 (2d Cir. 1998) (Weinstein, J., dissenting).

representatives must be chosen in a manner which affords all voting citizens an equal voice in the electoral process, thereby eliminating a system that disadvantaged city and suburban voters.<sup>593</sup> After *Wesberry*, the rule of proportionate representation was applied to all other levels of government. In *Reynolds v. Sims*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required that both houses of a state legislature be apportioned on a population basis.<sup>594</sup> Soon thereafter the one person, one vote rule was applied to subdivisions of the states.<sup>595</sup>

As County Attorney of Nassau County, I was particularly aware of how our suburban residents were denied support from Albany because their votes were diluted compared to sparsely inhabited upstate counties. My brief to the Supreme Court made the practical effects of

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<sup>593</sup>*Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1963) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

<sup>594</sup>*Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”); *see also* *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (“However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State’s citizens merely because of where they happen to reside.”).

<sup>595</sup>*Avery v. Midland County*, 390 U.S. 474, 480 (1968) (“If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population.”); *see also* *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 53 (1970) (“[A] qualified voter in a local election . . . has a constitutional right to have his vote counted with substantially the same weight as that of any other voter . . . .”); *cf.* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (exclusion of non-property owners without school age children from voting rolls of local school board is unconstitutional).

that disparity as clear as I could make them.<sup>596</sup>

### Felon Disenfranchisement

While we are now somewhat assured that our votes will be weighed equally with others, such proportionate representation is irrelevant to those who cannot vote at all.<sup>597</sup> More than *five million* Americans are barred from the polls because of a felony conviction.<sup>598</sup> In some urban areas, there are probably double digit percentages excluded.<sup>599</sup> In New York, for example, a convicted felon may not vote in any federal, state, and local elections until his maximum sentence of imprisonment has expired or until he has been discharged from parole.<sup>600</sup> The

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<sup>596</sup>Brief of Eugene H. Nickerson, Chairman, Board of Supervisors, Nassau County, Appellee, in Support of Appellants, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (No. 20).

<sup>597</sup>Millions of legal and illegal immigrants also, of course, cannot vote, even though they too are a de facto part of our country and community.

<sup>598</sup>“In ten states, a felony conviction can result in a lifetime ban from voting. Of these, two states permanently disenfranchise everyone with a felony conviction. In many other states people are denied the right to vote in prison, on parole, and on probation.” Brennan Center for Justice, *Voting After a Criminal Conviction*, [http://www.brennancenter.org/subpage.asp?key=38&proj\\_key=9042](http://www.brennancenter.org/subpage.asp?key=38&proj_key=9042). Only two states—Maine and Vermont—allow jailed felons to vote.

<sup>599</sup>See Justice Mapping Ctr., NYC Analysis, Oct. 2006, <http://www.justicemapping.org> (follow “NYC Analysis -- Oct. 2006” hyperlink).

<sup>600</sup> N.Y. ELECTION LAW § 5-106(McKinney 2007) provides in part:

2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. . . .
3. No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or vote at any election unless he shall have been

practice of some states to bar ex-felons from voting for life is particularly troubling,<sup>601</sup> and has been condemned both nationally<sup>602</sup> and internationally.<sup>603</sup> On a more hopeful note, a few states

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pardoned . . . or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

4. No person who has been convicted in another state for a crime or offense which would constitute a felony under the laws of this state shall have the right to register for or vote at any election in this state unless he shall have been pardoned . . . or his maximum sentence has expired, or he has been discharged from parole.
5. The provisions of subdivisions two, three and four of this section shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.

*Also see* Hayden v. Pataki, 449 F.3d 305, 312 (2d Cir. 2006) (en banc). New York has forbidden persons convicted of “infamous crimes” from voting since 1822. *Id.*

<sup>601</sup>In Florida and Washington felons are disenfranchised for life. *See* Hayden v. Pataki, 449 F.3d 305, 314 (2d Cir. 2006) (en banc). Until 1971, felons in New York were permanently disenfranchised for life. *Id.* at 327.

<sup>602</sup>In 2001, the National Commission on Federal Election Reform recommended that all states restore voting rights to citizens who have fully served their sentences. NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 14 (2001), [http://www.tcf.org/Publications/ElectionReform/99\\_full\\_report.pdf](http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf).

<sup>603</sup>In regards to felon disenfranchisement laws in the United States, the United Nations Human Rights Committee has declared that the “general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 or 26 of the Covenant, nor serves the rehabilitation goals of article 10(3).” U.N. Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America*, § 35, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006), *available at* <http://www.universalhumanrightsindex.org/documents/825/963/document/en/pdf/text.pdf>.

have recently begun to restore voting rights to ex-felons.<sup>604</sup>

Despite Supreme Court precedent<sup>605</sup> and the Court of Appeals for the Second Circuit's recent holding in *Hayden v. Pataki*<sup>606</sup> approving the exclusion of felons—and particularly ex-felons—from voting, such denials of the franchise should be deemed illegal under the Voting Rights Act and under the Constitution itself. The Supreme Court's finding that “exclusion of convicted felons from the franchise violates no constitutional provision”<sup>607</sup> is based upon an unnecessary expansion of the language in Section 2 of the Fourteenth Amendment allowing abridgement of the right to vote “for participation in rebellion, or other crime.”<sup>608</sup> Section 2 of the Fourteenth Amendment was enacted, however, to provide sanctions against a state's enacting racially discriminatory voting laws; it was not intended to constitute a constitutional

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<sup>604</sup>Maryland and Rhode Island voted to restore voting rights to ex-offenders. Maryland's April 2007 legislation “restores voting rights automatically upon completion of sentence and excludes those convicted of anything less than a felony from ever losing their voting rights,” thereby re-enfranchising “over 50,000 Maryland residents.” Brennan Center for Justice, 2006-2007 Progressive State Laws Dealing with the Voting Rights of People with Felony Convictions, [http://www.brennancenter.org/subpage.asp?key=38&tier3\\_key=49945](http://www.brennancenter.org/subpage.asp?key=38&tier3_key=49945).

<sup>605</sup>*Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Note, however, that the Supreme Court did invalidate an Alabama state law denying the right to vote to those convicted of certain crimes after finding that the law was adopted in order to disenfranchise African Americans. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

<sup>606</sup>*Hayden v. Pataki*, 449 F.3d 305, 312 (2d Cir. 2006) (en banc).

<sup>607</sup>*Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).

<sup>608</sup>U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced”).

stamp of approval for racially discriminatory felon disenfranchisement laws.<sup>609</sup> Section 2 of the Voting Rights Act, in contrast, prohibits state voting qualifications that, in totality, give “members [of protected minority groups] . . . less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>610</sup> Disenfranchisement statutes that prevent large numbers of minority group members in individual communities from voting would seem to fall under, and be prohibited by, Section 2 of the Act. Following the Eleventh Circuit’s decision in *Johnson v. Bush*,<sup>611</sup> the Court of

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<sup>609</sup>See *Hayden v. Pataki*, 449 F.3d 305, 350 (2d Cir. 2006) (en banc) (Parker, Jr., J., dissenting) (“[Section] 2 of the Fourteenth Amendment—which expressly contemplated and essentially sanctioned racially discriminatory voting qualifications—in no way diminishes Congress’s power to enforce the Fifteenth Amendment.”). Also compare *Hayden and Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (en banc) (both finding state felon disenfranchisement statutes to not violate Section 2 of the Voting Rights Act) with *Farrakhan v. Washington*, 359 F.3d 1009 (9th Cir. 2004) (en banc) (holding that the Voting Rights Act does apply to felon disenfranchisement cases).

<sup>610</sup>Section 2 of the Voting Rights Act provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1973(a). Section 1973(b), originally enacted in 1982, states in relevant part:

A violation of subsection (a) . . . is established if, based on the totality of circumstances, it is shown that . . . members [of protected minority groups] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

<sup>611</sup>*Johnson v. Bush*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (“The case for rejecting the plaintiffs’ reading of the statute is particularly strong here, where Congress has expressed its intent to exclude felon disenfranchisement provisions from Voting Rights Act scrutiny.”).

Appeals for the Second Circuit, in a divided 2006 en banc decision, held that the New York provision limiting felon voting rights does not violate Section 2 of the Voting Rights Act.<sup>612</sup> This decision, I think, was a mistake.

Not only are felons disenfranchised, but the one person, one vote standard of proportional representation is violated by the United States Census's practice of counting prison inmates as "residents" of their institution<sup>613</sup> rather than where they last lived. As in *Wesberry*, such a practice gives greater power to rural communities where the majority of state prisons are located, removing representation from the poor urban and minority areas where most prisoners come from and return home to. Our high rate of incarceration means this practice is not *de minimis*. As reported in the *New York Times*, "[f]or years, New York Republicans have propped up their slim majority in the State Senate partly by seizing upon this quirk . . . [so that] predominantly Republican rural districts wind up with more seats in the state Legislature, since seats are apportioned on the basis of population."<sup>614</sup> The Court of Appeals for the Second Circuit only recently recognized this as a possible vote dilution claim; the case has been remanded for further proceedings to determine whether New York's apportionment process results in dilution of minority votes in violation of the Voting Rights Act.<sup>615</sup>

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<sup>612</sup>Hayden v. Pataki, 449 F.3d 305, 350 (2d Cir. 2006) (en banc).

<sup>613</sup>See *Hayden*, 449 F.3d at 329 n.25 ("The United States Census Bureau counts inmates of correctional institutions as residents of the institution, and notes the 'usual residence' at which it counts people 'is not necessarily the same as the person's voting residence or legal residence.'") (citation omitted).

<sup>614</sup>Sam Roberts, *Court Asks if Residency Follows Inmates up the River*, N.Y. TIMES, May 13, 2006, at B1.

<sup>615</sup>Hayden v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006) (en banc).

## Gerrymandering

Partisan gerrymandering<sup>616</sup> remains a substantial obstacle to true democratic self-government.<sup>617</sup> My experience with redistricting indicates that drawing satisfactory new lines is never easy. That explains in part why the Supreme Court and other courts have been reluctant to intervene in equal protection challenges to politically-based redistricting.<sup>618</sup> Yet it does not justify benign neglect leading to violations of voters' rights.<sup>619</sup> Although it now seems that court challenges to gerrymandering remain justiciable after the Supreme Court's decision in *League of United Latin American Citizens v. Perry* ("LULAC"),<sup>620</sup> the applicable standard of

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<sup>616</sup>Gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." BLACK'S LAW DICTIONARY 708-09 (8th ed. 2004).

<sup>617</sup>See Jack B. Weinstein, *The Effect of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

<sup>618</sup>See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *Vieth v. Jubelirer*, 541 U.S. 267, 299 (2004) ("[P]olitical considerations will likely play an important, and proper, role in the drawing of district boundaries.") (quotation marks and citation omitted).

<sup>619</sup>*Gaffney*, 412 U.S. at 752-53.

<sup>620</sup>*League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006) (holding that the Republican-orchestrated 2003 Texas Congressional redistricting plan was "fair" even though it was solely motivated by partisan reasons because it produced a partisan balance matching the Republican-Democratic statewide vote split); see also *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) ("[W]e decline to hold such cases are never justiciable."). *But see* *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."). Indeed, one commentator has suggested that the only way to challenge gerrymandering under the current regime is through the initiative process. Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives To Establish Redistricting*

constitutional versus unconstitutional gerrymandering is ambiguous, making an effective challenge to a redistricting scheme almost impossible.

In the twenty years since *Davis v. Bandemer*, courts have focused on the electoral effects of—instead of the motivations behind—gerrymandering, despite the fact that “there is no constitutional requirement of proportional representation.”<sup>621</sup> According to Professor Richard Briffault, *Bandemer* “required significant and protracted distortion of the seats-votes relationship to state a constitutional claim, thereby causing for the next 15 years most . . . gerrymandering challenges to be rejected.”<sup>622</sup> In *LULAC*, Justice Kennedy, the swing vote, applied a similar constitutional test, inquiring whether the redistricting constituted a burden on the complainants’ “representational rights,” meaning the ability of a party to win a share of congressional seats corresponding to that party’s share of the vote in congressional races.<sup>623</sup> The fact that the districting plan was “driven solely by partisan concerns” was, in his opinion, “insufficient by itself to make out a case of unconstitutional gerrymandering.”<sup>624</sup>

Both *Bandemer* and *LULAC* “fail[] to appreciate the constitutional harm that occurs

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*Commissions Succeed or Fail*, American Constitution Society (Mar. 2007), <http://www.acslaw.org/files/Stephanopoulos%20-%20Redistricting%20Initiatives%20March%202007.pdf>.

<sup>621</sup>*LULAC*, 126 S. Ct. at 2610.

<sup>622</sup>Richard Briffault, *LULAC on Partisan Gerrymandering: Some Clarity, More Uncertainty*, 105 MICH. L. REV. FIRST IMPRESSIONS 58, 60 (2006).

<sup>623</sup>*Id.* at 59.

<sup>624</sup>*Id.* at 58 (summarizing *LULAC*); see also *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973).

when the sole motivation for a districting plan is partisan.”<sup>625</sup> Redistricting based solely on political purposes “constitutes the antithesis of ensuring citizenship participation in republican self-governance.”<sup>626</sup> Its aim is to create “safe” districts for incumbents and the political party currently in power.

“With a purely partisan plan, the representatives are choosing their people, rather than the people choosing their representatives.”<sup>627</sup> This was my own experience with redistricting in New York as representative of the County of Nassau and the New York Democratic Party: control by the parties and their current legislative representatives have benefited our representatives rather than the public. Recognizing this in *LULAC*, Justices Stevens and Breyer dissented because the Texas plan before the Court was motivated solely by political reasons.<sup>628</sup>

Denigration of the vote has been compounded by providing special appropriations for individual legislators to pass out funds in their districts and to provide a variety of methods of utilizing their position through state financed mailings and the like, so that it becomes almost impossible to unseat an unindicted incumbent. As the Supreme Court has noted, “the drafting of election laws is no doubt largely the handiwork of the major parties that are typically

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<sup>625</sup>Richard Briffault, *LULAC on Partisan Gerrymandering: Some Clarity, More Uncertainty*, 105 MICH. L. REV. FIRST IMPRESSIONS 58, 60 (2006).

<sup>626</sup>*Id.* (internal quotation marks omitted).

<sup>627</sup>*Id.* at 61.

<sup>628</sup>*LULAC*, 126 S. Ct. at 2627 (2006) (Stevens, J., concurring in part and dissenting in part) (“Because a desire to minimize the strength of Texas Democrats was the sole motivation for the adoption of Plan 1374C, the plan cannot withstand constitutional scrutiny.”) (internal citations omitted).

dominant in state legislatures.”<sup>629</sup> They wash each other’s hands to maintain incumbents’ seats.

### Ballot Access

Ballot access, the neglected stepchild of voting rights, still plays a vital role in ensuring full voter participation. In “our democratic republic it is essential that each person be afforded the right of equal access to the marketplace of political ideas and the opportunity of influencing governmental policy through election and persuasion of government officials.”<sup>630</sup> Our political marketplace is constantly reinvigorated by third parties and independent candidates, who play a “vital role.”<sup>631</sup> The Federal District Court for the Eastern District of New York has been a leader in ensuring ballot access for all candidates, not just those with the support of their respective state political party.<sup>632</sup> In New York the courts are available during and prior to election day to accomplish this role.

In one of my own early cases,<sup>633</sup> for instance, I struck down a federal law (the Postal Service Appropriation Act of 1980), which denied preferential third-class postal rates to “new” political parties, as violating the First Amendment and Equal Protection. More recently, my fellow trial judges enforced equal voting rights by: ordering that the nomination of New York

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<sup>629</sup>Anderson v. Celebrezze, 460 U.S. 780, 803 n.30 (1983).

<sup>630</sup>Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980).

<sup>631</sup>*Id.*

<sup>632</sup>*See, e.g.*, Lopez Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212 (E.D.N.Y. 2006); Chou v. N.Y. State Bd. of Elections, 332 F. Supp. 2d 510 (E.D.N.Y. 2004); Green Party of N.Y. State v. N.Y. State Bd. of Elections, No. 02-CU-6465, 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003); Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000).

<sup>633</sup>Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980).

state Supreme Court Justices be by primary election rather than through selection by the local major party leaders;<sup>634</sup> requiring New York state voter registration forms to include an “Other” check box for the name of a non-listed political party;<sup>635</sup> invalidating a state election law mandating that signatures on nominating petitions for independent candidates be witnessed by residents of the districts in which candidates run for office;<sup>636</sup> and ordering the names of *all* the Republican presidential candidates be placed on the New York Republican primary ballot.<sup>637</sup>

Historically, the Department of Justice’s Voting Rights Division, the government body primarily responsible for enforcing the 1965 Voting Rights Act, has not been driven by political

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<sup>634</sup>Lopez Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 244, 255 (E.D.N.Y. 2006) (“[T]he New York system is designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court. By preventing competition among candidates and deterring voter participation, the system is successful in fact at achieving that goal.”).

<sup>635</sup>Green Party of N.Y. State v. N.Y. State Bd. of Elections, No. 02-CU-6465, 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003).

<sup>636</sup>Chou v. N.Y. State Bd. of Elections, 332 F. Supp. 2d 510 (E.D.N.Y. 2004).

<sup>637</sup>Molinari v. Powers, 82 F. Supp. 2d 57, 69-70 (E.D.N.Y. 2000) (finding two particular requirements of New York’s statutory ballot access scheme unconstitutional as undue burdens on the right to vote under the First Amendment). Specifically, the *Molinari* court invalidated the provision requiring persons signing petitions to have delegates pledged to particular candidates listed on party primary ballot in congressional district list towns in which they live and the provision that petitioners’ signatures be witnessed by persons residing in same congressional district. *Id.* at 77 (“The only present comprehensible purpose of the residence requirement (and the separate listing of the witness’s town or city of residence, which was adopted to help enforce the residence requirement), as previously noted, is to disadvantage a candidate for President who does not enjoy the support of the Republican State Committee. This burden is not a coincidence. Instead, it is the product of deliberate design, a consideration that should alone be sufficient to invalidate it, even if it could otherwise be sustained.”); *see also, e.g.*, Stavitsky v. Bd. of Elections in the City of N.Y., 198 F. Supp. 2d 271 (E.D.N.Y. 2002) (candidate who prevailed in action to place her on ballot entitled to legal fees).

motives on voting matters.<sup>638</sup> The Division has long been respected for its dedicated career attorneys who have ensured nonpoliticization through the institutionalization of a preclearance process.<sup>639</sup> Since 2000, however, the Voting Rights Division allegedly has become increasingly political,<sup>640</sup> ignoring preclearance recommendations of career staff or forbidding them to make recommendations,<sup>641</sup> prioritizing voter “fraud” over voter discrimination, and encouraging career attorneys to leave to be replaced by members of the appropriate political persuasion.<sup>642</sup> If these allegations are true, our fundamental right to vote has been victimized.

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<sup>638</sup>Mark A. Posner, *The Politicization of Justice Department Decisions Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, American Constitution Society (Jan. 2006) (“With a few possible exceptions, political considerations have not entered into the application of the provisions of the Voting Rights Act in any national administration.”) (citing James P. Turner, *A Case-Specific Approach to Implementing the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING* 296, 299 (Bernard Grofman & Chandler Davidson eds., 1992)).

<sup>639</sup>*Id.*

<sup>640</sup>See Kat Zambon, *Groups Allege Systematic Effort to Politicize Justice Department*, ELECTIONLINE.ORG, July 5, 2005, [http://www.brennancenter.org/press\\_detail.asp?key=100&subkey=50055&proj\\_key=76](http://www.brennancenter.org/press_detail.asp?key=100&subkey=50055&proj_key=76) (describing a “four-pronged strategy to dismantle DOJ’s infrastructure, spread fear of voter fraud, restrict registration and voting and pursue politically-motivated prosecutions.”).

<sup>641</sup>Mark A. Posner, *The Politicization of Justice Department Decisions Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, American Constitution Society (Jan. 2006) (“The Bush Administration apparently has prohibited the career staff from making recommendations whether to preclear or object”).

<sup>642</sup>“The Bush Administration . . . has aggressively sought to re-make the Civil Rights Division’s career staff by moving long-time leaders out through early retirement and by removing the career staff from having any role in hiring new attorneys into the Division. These actions, when implemented over a period of years, have the potential to significantly undercut the independent, nonpartisan status of the Division’s career staff in general and the Voting Section’s staff in particular.” *Id.*; see also Dan Eggen & Paul Kane, *Goodling Says She ‘Crossed the Line’: Ex-Justice Aide Criticizes Gonzales While Admitting to Basing Hires on Politics*, WASH. POST, (May 24, 2007), at A01.

Political appointees allegedly have manipulated preclearance decisions on state voting restrictions over the objections of Voting Rights Division career attorneys. It has been charged: “First, in 2002, the Department delayed ruling on a request by the State of Mississippi for preclearance of its congressional redistricting plan, which resulted in the implementation of a competing plan adopted by a federal district court (at the urging of the state Republican Party) that was substantially more favorable to the Republicans.”<sup>643</sup> Second, in 2003, the Voting Rights career staff unanimously recommended denying preclearance to the proposed Texas Congressional redistricting plan after finding it would discriminate against African-American and Latino voters. Its recommendation was overruled by a political appointee and head of the Voting Rights Division.<sup>644</sup> Two years later, in 2005, the career staff again recommended denying preclearance, this time to the 2005 Georgia Photo ID Act. Again, preclearance was granted.<sup>645</sup>

Because of the structure of the preclearance process, there is little if any judicial oversight of preclearance grants or denials.<sup>646</sup> Section 5 of the Voting Rights Act provides no

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<sup>643</sup>Mark A. Posner, *The Politicization of Justice Department Decisions Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, American Constitution Society (Jan. 2006).

<sup>644</sup>Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

<sup>645</sup>*Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1304 (N.D. Ga. 2006).

<sup>646</sup>Mark A. Posner, *The Politicization of Justice Department Decisions Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, American Constitution Society (Jan. 2006) (“The Department almost never provides an explanation for its determination to preclear a submitted voting change.”).

private right of action to seek judicial review or contest preclearance approvals based on Section 5's nondiscrimination test. Neither are preclearance approvals "subject to review pursuant to the Administrative Procedure Act."<sup>647</sup>

Rather than enforcing Section 5 of the Voting Rights Act, the Department of Justice has allegedly turned its attention to aggressively pursuing voter fraud complaints.<sup>648</sup> It has been charged that there is no evidence that voter registration fraud in recent times has been a substantial problem anywhere. Rather, the problem has been that too few citizens register and vote. Never a priority in previous administrations,<sup>649</sup> the last two Attorney Generals have placed voter fraud high on their agendas.<sup>650</sup> "For deterrence," the Attorney General has authorized "prosecutors to pursue criminal charges against individuals." In the past, "charges were generally brought only against those involved in conspiracies."<sup>651</sup> "[Y]ears after the present administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections."<sup>652</sup> Only "about 120 people have been charged [with voter fraud] and 86 convicted as of" 2006.<sup>653</sup> Most of those convicted were

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<sup>647</sup>*Id.* (citing *Morris v. Gressette*, 432 U.S. 491 (1977)).

<sup>648</sup>Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007 (noting that DOJ officials "say that the volume of [voter fraud] complaints has not increased since 2002, but that it is pursuing them more aggressively.").

<sup>649</sup>*Id.*

<sup>650</sup>*Id.*

<sup>651</sup>*Id.*

<sup>652</sup>*Id.*

<sup>653</sup>*Id.*

immigrants or ex-offenders who may have been simply confused about voting laws. A federal panel, the Election Assistance Commission, has declared that the supposed “pervasive” voter fraud was “debatable.”<sup>654</sup> Just a few prosecutions will frighten potential voters, persuading them to stay away from the polling places, when they need to be encouraged to vote.

Despite the fact that voter fraud has proven chimerical, states have used its mythical threat to enact new voter identification provisions. The 2005 Georgia Photo ID act, for example, was supposedly designed to combat “voter fraud,” even though Georgia’s own Secretary of State noted that it was absentee voting (for which no photo identification was required) that had most potential for fraud.<sup>655</sup> Several fired United States Attorneys were allegedly “discharged because they did not pursue politically inspired allegations of voter fraud aggressively enough.”<sup>656</sup>

Attempts to effectively cut down access to the polling places by demanding excessive identification and the like should be stopped by the courts.<sup>657</sup> The states do have “broad powers

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<sup>654</sup>*Id.*

<sup>655</sup>*Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006) (“Representative Sue Burmeister, a Republican, sponsored the bill that became the 2005 Photo ID act. Representative Burmeister told the Voting Section of the DOJ ‘that if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud. She said that when black voters in her black precincts are not paid to vote, they do not go to the polls.’” (internal citations omitted)); *see also, e.g.,* Daniel P. Tokaji, *A New Poll Tax?, Election Fraud Isn’t a Problem, But the Supreme Court May OK an ID Law That Burdens Poor and Minority Voters*, L.A. TIMES, Sept. 28, 2007.

<sup>656</sup>Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A4; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

<sup>657</sup>*But see Purcell v. Gonzalez*, 127 S. Ct. 5 (2007) (denying review because of lack of historical facts on disenfranchisement).

to determine the conditions under which the right of suffrage may be exercised, absent discrimination which the Constitution condemns.”<sup>658</sup> It is the courts which must ensure that state conditions do not violate the intent behind the Voting Rights Act of 1965 and the National Voter Registration Act of 1993 (the “Motor Voter Act”): “to make voting easier and create a more inclusive democracy.”<sup>659</sup>

Twenty-four states<sup>660</sup> now impose some kind of voter identification requirement beyond what federal law requires.<sup>661</sup> They utilize devices such as photo identification or proof of citizenship. These methods turn the clock back, not forward, on voting by deliberately limiting some classes of voter rights and by indirectly re-introducing classifications of socioeconomic status into the electoral system as disguised poll taxes in violation of the Twenty-Fourth Amendment<sup>662</sup> and *Harper v. Virginia State Board of Elections*.<sup>663</sup> The 2005 Georgia Photo ID

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<sup>658</sup>*Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50 (1959) (upholding literacy tests).

<sup>659</sup>NAT’L NETWORK FOR ELECTION REFORM, PROOF OF CITIZENSHIP REQUIREMENTS, <http://www.nationalcampaignforfairelections.org/page/-/PROOF%20OF%20CITIZENSHIP.pdf> (last visited Nov. 7, 2007).

<sup>660</sup>NAT’L CONF. OF STATE LEGISLATURES, REQUIREMENTS FOR VOTER IDENTIFICATION (2007), <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>.

<sup>661</sup>The federal Help America Vote Act (“HAVA”) of 2002 imposed new identification requirements for first time voters registering by mail. NAT’L NETWORK FOR ELECTION REFORM, RESTRICTIVE OR DISFRANCHISING VOTER ID REQUIREMENTS, <http://www.nationalcampaignforfairelections.org/page/-/VOTER%20ID.pdf> (last visited Nov. 7, 2007).

<sup>662</sup>“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” U.S. CONST. amend. XXIV, § 1.

Act was invalidated by a federal court after the court found that the fee to obtain the required photo identification constituted a “poll tax.”<sup>664</sup>

The main effect of such voter identification laws is to frustrate voting by poor and minority voters. For instance, Arizona’s recent Proposition 200 requires new voters to present proof of citizenship to register and requires all voters to show identification at the polls. As a result, “in the first six months of 2005, more than 5,000 Arizona citizens had their voter registrations rejected.”<sup>665</sup> Even a South Carolina Governor was turned away from the polls because he did not have his voter registration card, although he did have his driver’s license listing his current address.<sup>666</sup> It is especially important for courts to carefully evaluate such laws

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<sup>663</sup>Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 666, 670 (1966) (declaring invalid Virginia’s poll tax on the ground that “wealth . . . has . . . no relation to voting qualifications” and holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”); *see also* Kramer v. Union Free School Dist. No. 15, 282 F. Supp. 70 (E.D.N.Y. 1968) (Weinstein, J., dissenting) (internal citations omitted). In *Harper*, at issue was only \$1.50 tax on voting, but the Court noted that “[t]he degree of the discrimination is irrelevant. . . . [A]s a condition of obtaining a ballot—the requirement of fee paying causes an ‘invidious’ discrimination that runs afoul of the Equal Protection Clause.” *Harper*, 383 U.S. at 668 (internal citations omitted).

<sup>664</sup>Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

<sup>665</sup>NAT’L NETWORK FOR ELECTION REFORM, PROOF OF CITIZENSHIP REQUIREMENTS, <http://www.nationalcampaignforfairelections.org/page/-/PROOF%20OF%20CITIZENSHIP.pdf> (last visited Nov. 7, 2007) (citing Elvia Díaz & Robbie Sherwood, *Prop. 200’s Effect Minimal*, ARIZONA REPUBLIC, June 5, 2005). Moreover, in the county containing Tucson, “more than sixty percent of new registrants—all eligible voters—were initially rejected.” *Id.*; *see also* Brief for Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Plaintiffs/Appellants, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (Nos. 06-16521, 06-16702, 06-16706).

<sup>666</sup>Deborah Hastings, *Complaints of Dirty Tricks Top Voting Problems*, N.J. RECORD, Nov. 8, 2006, at A11. Governor Sanford subsequently obtained his voter registration card and returned to vote.

for equal protection violations,<sup>667</sup> as one Georgia federal district court has done twice.<sup>668</sup>

An attempt was made by Congress to increase voter registration by requiring notification of the right at state motor vehicle bureaus.<sup>669</sup> It has proven useful. But the other arm of the statute requiring notification to welfare applicants has been practically ignored.<sup>670</sup> The result is to favor middle class voters over the poorer classes who do not own cars.<sup>671</sup> In our court, in the Eastern District of New York, voting registration information is given to every person as he or

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<sup>667</sup>Both Georgia's 2005 and 2006 Photo ID laws received DOJ preclearance. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1336-37 (N.D. Ga. 2005); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1298 (N.D. Ga. 2006); *see also* Pam Belluck, *States Face Decisions on Who is Mentally Fit to Vote*, N.Y. TIMES, June 19, 2007.

<sup>668</sup>*Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1336-37 (N.D. Ga. 2005).

<sup>669</sup>Deborah Hastings, *Complaints of Dirty Tricks Top Voting Problems, Threats in Virginia, Armed Man at Arizona Polls*, N.J. RECORD, Nov. 8, 2006; NAT'L NETWORK FOR ELECTION REFORM, RESTRICTIVE OR DISENFRANCHISING VOTER ID REQUIREMENTS (2006); NAT'L NETWORK FOR ELECTION REFORM, PROOF OF CITIZENSHIP REQUIREMENTS, <http://www.nationalcampaignforfairelections.org/page/-/PROOF%20OF%20CITIZENSHIP.pdf> (last visited Nov. 7, 2007); LEGAL DEF. FUND, VOTING RIGHTS ADVOCATES CHALLENGE GEORGIA PHOTO ID LAW IN FEDERAL COURT, <http://www.naacpldf.org/content.aspx?article=684> (last visited Nov. 7, 2007); NAT'L CONF. OF STATE LEGISLATURES, REQUIREMENTS FOR VOTER IDENTIFICATION (2007).

<sup>670</sup>SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1119 ff. (3d ed. 2007).

<sup>671</sup>*See also* Louis Menand, *Fractured Franchise: Are the Wrong People Voting?* NEW YORKER, July 9 & 16, 2007, at 88; ACORN, DEMOS & PROJECT VOTE, TEN YEARS LATER, A PROMISE UNFULFILLED: THE NATIONAL VOTER REGISTRATION ACT IN PUBLIC ASSISTANCE AGENCIES 1995-2005 (2005); *id.*, MAXIMIZING VOTER REGISTRATION IN HUMAN SERVICE AGENCIES (2005); DEMOS BRIEFING PAPER, EXPANDING VOTER REGISTRATION FOR LOW-INCOME CITIZENS (N. CAROLINA) (2007).

she is sworn in as a citizen.<sup>672</sup>

Given the drive to keep minorities out of the polling places, it is particularly unfortunate that the backstop to prevent discrimination against minorities, the United States Commission on Human Rights appears to have been perverted.<sup>673</sup> For example, the Commission allegedly did not investigate charges that Black neighborhoods in Ohio received too few voting machines in the 2004 election.<sup>674</sup>

### Campaign Finance

Congress and the states have exercised an appropriate constitutional role in trying to minimize, to the extent practicable, the role of money in elections. The federal McCain-Feingold Act of 2002 (the Bipartisan Campaign Reform Act, or “BCRA”)<sup>675</sup> attempted to close some campaign finance loopholes in federal elections. Currently, the New York State Legislature is considering the first major overhaul of the state’s “notoriously lax” campaign

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<sup>672</sup>See also SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD A. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1119 (3d ed. 2007) (introductory note on the Help America Vote Act of 2002).

<sup>673</sup>Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, BOSTON GLOBE, Nov. 6, 2007.

<sup>674</sup>*Id.*

<sup>675</sup>In 2002, Congress enacted the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, 116 Stat. 91 (also known as the McCain-Feingold Act), which amended the Federal Election Campaign Act of 1971 (“FECA”). BCRA was designed to address the issues of soft money in campaign financing and “issue ads” by defining “electioneering communications.” Before BCRA, corporations could use “independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified federal candidate.” Fed. Election Comm’n v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2659 (2007) (“WRTL”) (citing Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986) and Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (per curiam)).

finance laws enacted in the post-Watergate era.<sup>676</sup>

The Supreme Court's most recent campaign finance decision<sup>677</sup> constitutes a major victory for deregulation. In 2006, the Court for the first time struck down individual contribution limits in candidate elections as too low.<sup>678</sup> And in *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("WRTL"),<sup>679</sup> a five-to-four decision rendered in 2007, the Court invalidated parts of the McCain-Feingold Act as unconstitutional under the First Amendment, as applied to limitations on corporate and union spending on some political advertisements. Although the majority denied overruling its four-year-old decision in *McConnell v. Federal Election Commission* finding the restrictions facially constitutional,<sup>680</sup> WRTL effectively did so. Instead of limiting the influence of money on politics, the Supreme Court's new test in WRTL, it has been charged, "will not pose a formidable obstacle for those corporations and unions that wish to run ads to influence elections. As a result, we could well see a significant rise in corporate [and union] election-related spending."<sup>681</sup>

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<sup>676</sup>Danny Hakim & Nicholas Confessore, *Deal in Albany Tightens Limits on Election Cash*, N.Y. TIMES, July 20, 2007, at A1. The proposed bill would, inter alia, reduce the amounts a donor can give specific state candidates, require donors to disclose their occupation and employment, and establish New York's first limit on contributions to soft-money accounts. Considering that, under the proposed bill, an individual donor may still donate up to \$25,000 (down from \$55,900) to a candidate in a statewide election, the suggested reforms, seem far from stringent.

<sup>677</sup>Fed. Election Comm'n v. Wisc. Right to Life, Inc., 127 S. Ct. 2652 (2007).

<sup>678</sup>Randall v. Sorrell, 126 S. Ct. 2479, 2500 (2006).

<sup>679</sup>127 S. Ct. 2652 (2007).

<sup>680</sup>McConnell v. Fed. Election Comm'n, 540 U.S. 93, 178, 201 (2003).

<sup>681</sup>Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in*

After *WRTL*, further legislative campaign finance limits are, some believe, almost pointless. Encouraging freedom of access to the public through computer blogs and chatrooms, and other technology, by offering free television time, or utilizing other fairness doctrines may help level the economic-political playing field without running afoul of free speech guarantees.

*Bush v. Gore*

*Bush v. Gore* constitutes a unique intervention by the Supreme Court in a presidential election.<sup>682</sup> Prematurely taking this matter out of the hands of the Florida state court seemed contrary to our concept of states' rights, comity and federalism. It is not evident that this precipitous action was necessary in view of the power of Congress and its constitutional control over any hiatus in the electoral process. The Florida state courts and legislature and Congress had not yet exercised their full powers. The Court's decision was accepted, however, by our people who are habituated to rulings of law rather than rioting in the street to protect their rights.

The majority of the Court promised not to repeat and rely upon this bizarre precedent.<sup>683</sup> This limitation may in the long-run, prove to be unfortunate. It prevents developing and applying equal protection doctrine that might result in more effective and equal voting

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FEC v. Wisconsin Right to Life (Loyola-LA Legal Studies Paper No. 2007-33, 2007), available at <http://ssrn.com/abstract=1003922>; see also, e.g., Jim Rutenberg & David D. Kirkpatrick, *A New Channel for Soft Money Appears in Race*, N.Y. TIMES, Nov. 12, 2007, at A1 ("Thanks to a recent decision by the Supreme Court, most of these groups, including the McCain-friendly foundation, will be able to operate with even less public disclosure than such entities did in 2004.").

<sup>682</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

<sup>683</sup> *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1090 ff. (3d ed. 2007).

procedures affecting matters such as gerrymandering and other voting distortions. According to Professor Samuel Issacharoff and his colleagues, Florida's voting and counting procedures varied widely over the state, resulting in gross inequalities in the count relied upon by the Supreme Court majority,<sup>684</sup> making application of the rule of equal protection to support the Court's decision dubious on the facts. Appellate courts should not take fact-finding out of the hands of the lower courts.

In United States history there have been three other constitutional crises involving presidential elections. The first was the controversy over the election as president of Burr or Jefferson, resolved for the future by the Twelfth Amendment.<sup>685</sup> After both Jefferson and Burr received the same number of votes in the Electoral College, the choice devolved to the House of Representatives, which then deadlocked thirty-six times. The immediate political crisis was solved politically by Hamilton's shifting some New York votes to Jefferson because he distrusted Burr, thereby signing his own delayed death warrant, which Burr executed in a duel.<sup>686</sup> The second was the House of Representatives' granting the presidency to John Quincy Adams even though Andrew Jackson had beaten him by a large plurality in the Electoral

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<sup>684</sup>*Id.* at 1089-90.

<sup>685</sup>U.S. CONST. amend. XII (creating the current form of the electoral college system); *see* EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800: AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2007); JOHN E. FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004).

<sup>686</sup>RON CHERNOW, *ALEXANDER HAMILTON* 630 ff. (2004); *THE FOUNDING FATHERS, ALEXANDER HAMILTON: A BIOGRAPHY IN HIS OWN WORDS* 380 (Mary-Jo Kline, ed., 1973); JEFFREY B. MORRIS & RICHARD B. MORRIS, *ENCYCLOPEDIA OF AMERICAN HISTORY* 1039 (7th ed. 1996).

College.<sup>687</sup> The third was the sordid Hayes-Tilden electoral dispute of 1876, which ended in the political deal to kill Reconstruction.<sup>688</sup>

Had the political process been allowed to work itself out in the 2000 election, the result would probably have been much the same but the shock to our constitutional system would have been reduced.<sup>689</sup> According to the experts, several non-Article III possibilities presented themselves at the time. Florida itself may have settled the issue in Bush's favor. If not, the Republican-controlled House might have decided the race, and Bush would have won. Because the evenly-split Senate would have decided the vice-presidential race, arguably Joseph I.

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<sup>687</sup>1 CONG. QUARTERLY'S GUIDE TO U. S. ELECTIONS 232-33 (4th ed. 2001); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 19 (1953), Jill Lepore, *Party Time, Smear Tactics, Skulduggery, and the Debut of American Democracy*, *NEW YORKER*, Sept. 17, 2007, at 94-96. Jackson went on to win the next two presidential elections.

<sup>688</sup>See ERIC FONER, *RECONSTRUCTION* 575 (2005); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 751 ff. (rev. ed. 2004). Referring to the Compromise of 1877, "Rutherford B. Hayes eked out a victory by promising to withdraw U.S. troops from the South if he were elected. Hayes kept his election promise, thereby removing the federal lid from the anti-integration forces." *Speaker: Political Will, Public Pressure Make or Break Court Decisions*, *LAW QUADRANGLE NOTES*, UNIV. OF MICH. LAW SCH., Spring 2007 at 83.

<sup>689</sup>See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 *VA. L. REV.* 551, 629 (2004) ("If the Supreme Court had not intervened, Congress would have solved the succession problem in one way or another, but in a way that would have emphasized the obvious anachronisms and irrationalities of the existing system.") (urging the passage of a constitutional amendment to remove the sitting Vice-President from acting, in his capacity as the President of the Senate, to "open all the Certificates" of electoral college votes in presidential elections as mandated by the Twelfth Amendment); see also Jeffrey Toobin, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 176 (2007) (referring to the likelihood of Bush's election had Court stayed out: "The tragedy of the Court's performance in the election of 2000 was not that it led to Bush's victory but the inept and unsavory manner with which the justices exercised their power."); *id.* at 172 ("The Court's opinion preserved and endorsed a less fair, and less accurate, count of the votes."); *id.* at 161 (state recount probably would have been completed in timely manner).

Lieberman might have become Vice President. (Senator Lieberman could have voted for himself, and Gore, as Vice-President and President of the Senate, could have voted for Lieberman, breaking any fifty-fifty tie.<sup>690</sup>) Had the Democratic-dominated Florida State Supreme Court<sup>691</sup> granted Gore's request to count 14,000 disputed ballots and then declared Gore the winner, two slates of presidential electors from Florida might have been sent to Washington: one by the Democratic State Court and one appointed by the Republican-controlled Florida Legislature.<sup>692</sup> In that case, the House of Representatives could then have chosen the Republican set of electors, granting Bush the Presidency. (The Constitution calls for a state-by-state vote in the new House of Representatives, and Republicans controlled a majority of state delegations.<sup>693</sup>) Given the multiplicity of non-Article III options, it does not appear to have been necessary for the Supreme Court to decide the dispute about who was elected President.

If we are to maintain an international presence as a "leading democracy," we, as citizens and as judges, may not allow the right to vote to be undermined. Our basic problem remains: too few vote and have their vote counted. Courts must remain vigilant guardians of the voting booths. *Bush v. Gore* provides a cautionary tale for judges not to overstep our appropriate bounds.

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<sup>690</sup> Letter from Michael J. Broyde, N.Y. TIMES, Dec. 7, 2000.

<sup>691</sup> William Safire, *Al Gore Agonistes*, N.Y. TIMES, Dec. 7, 2000, at A39.

<sup>692</sup> David Firestone, *Contesting the Vote: The Overview; With Court Set to Hear Appeal, Legislators Move on Electors*, N.Y. TIMES, Dec. 7, 2000, at A1 (noting that Republican leaders of Florida Legislature had called a special legislative session for December 8, 2000, to ratify the original Republican presidential electors who would support Bush in the event a court reversed Bush's victory in Florida).

<sup>693</sup> William Safire, *Al Gore Agonistes*, N.Y. TIMES, Dec. 7, 2000, at A39.

In Justice Cardozo's first year at the Supreme Court only one of the cases he wrote an opinion on involved a constitutional question. In *Nixon v. Condon*,<sup>694</sup> Cardozo, writing for a five-member majority, struck down a Texas Statute under which political parties could allow only Whites to participate in primary elections. "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black," Cardozo wrote.<sup>695</sup> And he went on to declare: "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."<sup>696</sup> An equal obligation to level barriers by socioeconomic and political status remains.

### Transparency

For people to participate in government, they need to know what is going on. The free press and other media operate as windows into government that should be as unrestricted as possible. Cases such as the *New York Times v. Sullivan*,<sup>697</sup> in which libel suits were severely limited on constitutional grounds, and *New York Times Co. v. United States*,<sup>698</sup> in which publication of the possibly illegally obtained Pentagon Papers were permitted to be published despite claims of secrecy and national interest in wartime, were essential landmarks of

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<sup>694</sup>286 U.S. 73 (1932); see RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 172 (1997).

<sup>695</sup>*Nixon*, 286 U.S. at 89.

<sup>696</sup>*Id.*

<sup>697</sup>376 U.S. 254 (1964).

<sup>698</sup>403 U.S. 713 (1971).

transparency protecting what has been called the fourth branch of our government—the Press. “On the view that the press has special institutional responsibility as a watchdog of government . . . access rights would appear indispensable. But claims of a special press right of access in general have not fared well, with the exception of the right to criminal trials . . . .”<sup>699</sup>

At the *nisi prius* level we often deal with the more mundane issue of protection of business secrets in discovery.<sup>700</sup> Whether other judges and I have gone too far in closing off access to the public of papers in such cases as *Agent Orange* and a recent pharmaceutical case, *Zyprexa*, to induce free disclosure and settlement is not clear.<sup>701</sup> The presumption, it seems to me, should favor ultimate disclosure in the public interest as I provided in *Agent Orange*.<sup>702</sup> But the needs for private business interests to control their own internal operative secrets cannot be ignored. Certainly, sealing orders of the court must be followed if the courts are not to be neutered.<sup>703</sup> Without full discovery, relatively uninhibited by privacy concerns it becomes

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<sup>699</sup>KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1207 (16th ed. 2007).

<sup>700</sup>Jack B. Weinstein, *Secrecy in Civil Trials*, 9 J.L. & POL’Y 53 (2001); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1 (2001); *see also, e.g.*, THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE 94-95 (softcover ed. 2005).

<sup>701</sup>Tresa Baldas, *Sealed Records Meet Resistance*, NAT’L L.J., Nov. 5, 2007, at 1 (sealing records by judges being challenged).

<sup>702</sup>*See In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979) (privilege upheld with respect to attorney’s summaries and analyses of reports, but denied with respect to the reports themselves); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 66-72 (1995).

<sup>703</sup>*See In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007).

almost impossible to carry out anti-discrimination policies in the courts.<sup>704</sup> Where the media abuse by libel or other means, they cannot be permitted to hide behind a privacy screen.<sup>705</sup>

Secrecy about such matters as systematic intrusions into Fourth Amendment rights prevents the people and the legislature from controlling policy to protect those rights. Much of the internal materials are held under privileged seal too long, mainly it can be inferred, to protect against criticism for ineptitude rather than because of legitimate needs. In wartime, breaking codes of the enemy, or plans to attack or defend, or data on secret weapons, and the like needs close protection. But beyond those clear needs for security much of the secrecy demanded by government represents bureaucratic self protection.<sup>706</sup> Even our secret court meets in secrecy,

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<sup>704</sup>See also, e.g., Robert D. McFadden, *City Is Rebuffed on the Release of '04 Records*, N.Y. TIMES, Aug. 7, 2007, at A19 (but identity of undercover police protected). In *Cortright v. Resor*, 325 F. Supp. 797 (E.D.N.Y. 1971), *rev'd*, 447 F.2d 245 (2d Cir. 1971), I made the mistake of sealing a letter that proved a civil rights violation because I was too embarrassed by the governments' acts). In *Birnbaum v. United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 558 F.2d 319 (2d Cir. 1978), the government's clandestine project opening letters to and from the Soviet Union violated Fourth Amendment rights without those whose rights were violated, or Congress, knowing what was going on.

<sup>705</sup>See, e.g., *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 364-65 (E.D.N.Y. 1994) (TV cameras taken into private home during search by government agents); *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 397 (E.D.N.Y. 2007) (documents stolen with help of a reporter).

<sup>706</sup>See Erika C. Collins, *Privacy Regulations in the EU Serve as Obstacles to Carrying Out Anti-Discrimination Policies*, N.Y.L.J., Aug. 27, 2007, at 9; *cf.*, e.g., Justin Scheck, *9th Cir. Panel Proposes Wiretap Candor*, NAT'L L. J., Aug. 20, 2007, at 15; Joseph Weisberg, *The C.I.A.'s Open Secrets*, N.Y. TIMES, Aug. 27, 2007, at A17 (difficulty in author's and others in dealing with material unnecessarily stamped secret); Mark Mazzetti, *C.I.A. Lays out Errors It Made Before Sept. 11*, N.Y. TIMES, Aug. 22, 2007, at A1 (delay in release limited full facts to public during years of critical debate and decision making); Adam Liptak, *Panel Dismisses Suit Challenging Secret Wiretaps, Secrecy is a Legal Asset as Plaintiffs Can't Prove Their Right to Sue*, N.Y. TIMES, July 7, 2007, at A1; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. TIMES, Aug. 18, 2007; Robert D. McFadden, *City Is Rebuffed on the Release of '04 Records*, N.Y. TIMES, Aug. 7, 2007, at A19 (identity of undercover agents protected); Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation*

and keeps its opinions confidential.<sup>707</sup>

An extended discussion of the broadcasting of trials and appeals is not needed. It is enough to say that I favor television broadcasts of trials and appeals and I would allow them in my court where the parties do not object.<sup>708</sup> No argument against broadcasting Supreme Court arguments has ever persuaded me; these appellate disputes constitute the great civic debates of

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*Program*, NEW YORKER, Aug. 13, 2007, at 47; Jeffrey Rosen, *Conscience of a Conservative: Inside the Secret Legal Battle over the War on Terror*, N.Y. TIMES MAG., Sept. 9, 2007, at 40 (even now much of the discussion on policy and practice on wiretapping and other intrusions are not known to the public, Congress or the courts); Adam Liptak, *Judge Voids F.B.I. Tool Granted by Patriot Act*, N.Y. TIMES, Sept. 7, 2007, at A18 (secret demands of F.B.I. to compel production of private records); William Safire, *Redact This*, N.Y. TIMES MAG., Sept. 9, 2007, at 22 (use of term to conceal portions of documents); BRUCE OUDES, FROM THE PRESIDENT: RICHARD NIXON'S SECRET FILES 648 (1989) (release by Judge John J. Sirica of conversations admitted in evidence).

<sup>707</sup>Adam Liptak, *Court Cloaked in Secrecy Shows a Hint of Openness*, N.Y. TIMES, Sept. 10, 2007, at A16 (court whose members are appointed by the Chief Justice that considers warrants for National Security Agency meets inside the Justice Department in secrecy; in a rare decision it ordered the government to respond to a motion by the American Civil Liberties Union to disclose parts of its decision approving and limiting some surveillance programs); *see also, e.g.*, Mark Hamblett, *Judge Rules Unconstitutional Altered Security Letter Gag Rule*, N.Y.L.J., Sept. 7, 2007, at 1; Adam Liptak, *Judge Voids F.B.I. Tool Granted by Patriot Act*, N.Y. TIMES, Sept. 7, 2007, at A18; William Glaberson, *Officials Cite Danger in Revealing Detainee Data*, N.Y. TIMES, Sept. 12, 2007, at A18; *Altered FBI Security Letter Gag Rule Again Held Unconstitutional as Breach of First Amendment*, N.Y.L.J., Sept. 12, 2007, at 29 (citing *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007)).

<sup>708</sup>Jack B. Weinstein & Diane Zimmerman, *Let the People Observe Their Courts*, N.Y.L.J., Mar. 31, 1977, at 3, Apr. 1, 1977, at 3 (advocating TV in the courtroom). *But see* *Orena v. United States*, 973 F. Supp. 1091 (E.D.N.Y. 1997) (rejecting application to broadcast proceedings in criminal case because the Federal Rules of Criminal Procedure forbid it and it might taint prospective jury). Frances Gibb, *High Drama at New Supreme Court [Of Great Britain] May Go Out on Television*, TIMESONLINE, Oct. 22, 2007, at <http://business.timesonline.co.uk/tol/business/law/article2709537.ece> (cameras on appeals, but not at trial, urged by Jack Straw, the Justice Secretary, after a pilot project). *But cf. United States Judicial Conference Opposes Use of Cameras in Federal Trial Courts*, THIRD BRANCH, Oct. 2007, at 1 (but Courts of Appeals are authorized to allow it, as do the Second and Ninth Circuits).

our time that all should be privy to. Nevertheless, strong opposition continues to opening up the courts to public view.<sup>709</sup>

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<sup>709</sup>*See, e.g.*, Aaron S. Bayer, *Appellate TV*, NAT'L L.J., Sept. 17, 2007, at 14 (Supreme Court and other courts oppose); *cf.* Marcia Coyle, *DOJ Wants to Bar Web Access to Plea Bargains*, NAT'L L.J., Sept. 17, 2007, at 6. For one form of limited access useful in class actions and the like, see "Courtroom Connect" at <http://www.courtroomconnect.com/>.

IX. “For” Requires Emphasis on Substantive Rules of Redress, Particularly for the Disadvantaged

Power was to be exercised “*for*” the people. That is to say, the government was to help all the people—equally to the extent possible—and not classes favored by title, birth, inheritance or wealth.

As Professor Adam Wolfson has pointed out, one great difference between Madison and Lincoln was that Madison stressed the protection of individual private property and private freedoms to amass wealth as the goals of government in the public interest, necessarily leading to more economic inequality, while Lincoln’s “robust understanding” stressed the need to more directly “elevate the condition of all men.”<sup>710</sup> Wolfson relies on Lincoln’s July 4, 1861 “Message to Congress in Special Session,” contrasting the difference between the Confederacy’s goals and that of the Union. The new President declared:

This is essentially a People’s contest. On the side of the Union, it is a struggle . . . of government whose leading object is *to elevate the condition of men*—to lift artificial weights from *all* shoulders—to clear the paths of laudable pursuit for *all*—to afford *all*, an unfettered start, and a fair chance, in the race of life.<sup>711</sup>

That view suggests the role of government—and the law—in lending a hand to those who need it.

Education

My discussion of education and how it supports our ideal of a more perfect union is divided into four sections. The first, “inequality by law,” discusses our repugnant historical

<sup>710</sup>Adam Wolfson, *Public Interest Lost?*, DAEDALUS, Fall 2007, at 20-21, 26.

<sup>711</sup>*Id.* at 27 (quoting ABRAHAM LINCOLN, SELECTED SPEECHES AND WRITINGS 313) (emphasis added).

jurisprudence of separate but equal. The second, “equality by law,” explains how law was used to attempt equalization. The third and fourth sections, “inequality in fact abetted by law” and “equality in fact encouraged by law,” discuss contemporary segregation issues.

### Inequality By Law

Education is a foundation of our democracy. Without an educated population voting, jury service or other participation “by” citizens in government is impracticable. Following the race riots of 1967, the National Advisory Commission on Civil Disorders (the “Kerner Report”) concluded:

Education in our democratic society must equip children of the nation to develop their potential and to participate fully in American life. For the community at large, the schools have discharged this responsibility well. But for many minorities, and particularly for the children of the racial ghetto, the schools have failed to provide the educational experience which could help overcome the effects of discrimination and deprivation.<sup>712</sup>

Much the same conclusion would be reached today.

Slavery—with its conjoined racial discrimination—has been the great corrosive of this country’s democracy.<sup>713</sup> It was introduced almost with the first European settlers at the beginning of the seventeenth century. The laws of the colonies enforced this terrible institution. At the end of the eighteenth century, our Constitution accepted slavery through the three-fifths

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<sup>712</sup>REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 236 (1968).

<sup>713</sup>*See, e.g.,* Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 222 (2003) (“In the case of slavery, the derivative harm is plain—slavery has led to institutionalized racism in society, a continuing harm to slave descendants. The comparative disadvantages of racial minorities, including Blacks, are well documented.” The author continues by noting statistical disparities among racial groups) (footnotes omitted.) *See generally* Jack B. Weinstein, *Brown v. Board of Education After Fifty Years*, 26 CARDOZO L. REV. 289 (2004).

voting compromise and the temporal limitation on power to outlaw the slave trade. In the mid-nineteenth century, the terrible *Dred Scott* decision declared, on racist and constitutional grounds, that African-Americans were a lesser caste and that attempts to limit the spread of slavery were invalid.<sup>714</sup> That decision was one of the immediate causes of the mid-nineteenth century Civil War. The war, in turn, led to Emancipation and to the Thirteenth, Fourteenth, and Fifteenth Amendments.

At the end of the nineteenth century, racial subjugation and discrimination were again legally approved and expedited by the Supreme Court's decision in *Plessy v. Ferguson*.<sup>715</sup> The law once again plunged the dagger of degradation into the African-American community. Towards the middle of the twentieth century, the NAACP developed its plan to first attack separate but equal rules at the graduate and law schools. Judges could not blink at the fact that separation from professional peers necessarily would lead to stunted and unequal careers.

Finally came the rampart of primary and secondary schools—and then those of voting, miscegenation, housing, employment and other forms of discrimination. Forced legal segregation in the public schools was the greatest and most difficult barrier to breach. Everyone understands the profound effect of segregated and inadequate schools on spirit and opportunity in adulthood.

### Equality By Law

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<sup>714</sup>*Dred Scott v. Sandford*, 60 U.S. 393, 408 (1856). The decision was strongly attacked by Abraham Lincoln, but defended by Douglas; in a sense this may be taken to have constituted the beginning of Lincoln's skillful quest for the presidency. See ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 22-23, 28 (Roy P. Basler ed., 2d ed. 2001).

<sup>715</sup>163 U.S. 537, 551 (1896).

Fifty years ago—some three and a half centuries after slavery was introduced here—*Brown* got us over most of the *legal* barricade to equal education. But the *real life* barriers of unequal educational and other opportunities in fact still exist into the twenty-first century.<sup>716</sup>

The people who helped give life to *Brown* were of all colors and backgrounds. The integration of the Armed Forces under Truman, many statutes under the Johnson and other administrations, and the work of the Court of Appeals for the Fifth Circuit under strong federal judges who put their lives and careers at risk in enforcing *Brown*, kept us moving forward. The mostly unsung heroes were the young children, the students, the Black teachers who lost their jobs, the people boycotting buses, the people marching in the streets, and those risking their lives and livelihoods in trying to register to vote.

Thurgood Marshall, who served on the Court of Appeals for the Second Circuit as well as on the Supreme Court pulled together lawyers, historians, social scientists, social psychologists, and financiers from the business community—people of all skin colors, from the deep south, and all other parts of the nation to tear down the final bastions of legally enforced segregation. He conducted a constant series of pre- and post-*Brown* arguments and discussions on cases prosecuted by the NAACP Legal Defense Fund. He cajoled. He threatened. He joked. He used his rare skills as a lawyer and as a leader in an unrelenting battle on behalf of desegregation and equality of educational opportunity. He burned with a bright incandescence. Then lawyers like Constance Motley, Bob Carter, Jack Greenberg, and so many others who

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<sup>716</sup> See, e.g., Mike Klesius, *The Rise and Decline of Integration in America*, AARP BULL. Sept. 2007, at 35; cf. David E. Bloom, Michael R. Kremer & Gene B. Sperling, *Education in the Developing World*, BULL. AM. ACAD. OF ARTS & SCIENCES, Summer 2007, at 13, 19 (need to help ensure that children are not only in school, but learning something); Dan Barry, *Legacy of School Segregation Endures, Separate But Legal*, N.Y. TIMES, Sept. 30, 2007.

practiced under Marshall’s leadership, traveled to the South where they, together with their clients and local African-American lawyers, were at risk of suffering brutalities, both physical and mental.

I must confess my own lack of understanding in opposing the use of Dr. Kenneth Clark’s experiments to prove that separation of children was necessarily socially and psychologically deleterious. I did not realize then (as I do now after years of practice) that judges must be taught to understand the conditions of the real world, and must have a factual hook on which to hang important decisions. Ultimately, I came to appreciate that famous footnote number eleven in *Brown* that so many have derided—with its citation of studies on the negative psychological effects of segregation.<sup>717</sup> Judges must have a window to life, to the hearts and minds of the people we serve, if we are to rule justly. Justices like Cardozo and Holmes recognized the need to candidly acknowledge the repressed biases and ignorance that often rule judicial decision making.<sup>718</sup>

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<sup>717</sup>*Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). Footnote eleven cited a number of sociological studies, notably one conducted by Dr. Kenneth Clark, demonstrating that segregation could have deleterious effects on African-American children. *Id.* Critics of footnote eleven have questioned, generally, the propriety of applying social science to constitutional questions. *See, e.g.*, William E. Doyle, *Can Social Science Data be Used in Judicial Decisionmaking?*, 6 J.L. & EDUC. 13, 18 (1977). They have also criticized the methods applied by scientists of the time. *See, e.g.*, Joseph P. Viteritti, *A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question*, 57 N.Y.U. ANN. SURV. AM. L. 89, 94 (2000) (questioning Dr. Clark’s methodology). Chief Justice Earl Warren argued, however, that the outcome of the case would have been the same with or without the studies. To “stress[] that the sociology was merely supportive and not the substance of the holding,” Warren pointed out that “[i]t was only a note, after all.” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 709 (rev. ed. 2004).

<sup>718</sup>*See Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F. Supp. 2d 401, 407-08 (E.D.N.Y. 2004) (“I think that the judges themselves have failed adequately to recognize

It was my conclusion, having fought in World War II, that this nation could never again ignore the effects on ourselves and others of the denigration of people, as I observed it and as it was embodied in the Holocaust and other horrors continuing into today. We could no longer ask of the world what we denied to so many of our own citizens—equality and dignity. Our own self-respect, and the respect of the world for us, demanded a change.<sup>719</sup> Professor Charles Black of Yale and Columbia Law Schools had it right, I think, when he rebutted academic critics of the *Brown* case: separation was designed to denigrate and subjugate by demonstrating inferiority; it was the basis for terrible physical, economic, social, and legal abuses—a pattern that racists long embraced.<sup>720</sup>

Now, fifty years after *Brown*, in the fourth century after our laws began to enforce American slavery, and a century and a half after its abolition and the promise of full freedom, the dream of equality continues unrequited. Despite great efforts, segregation and disparity continue: nearly half of the Black population lives in communities that are ninety percent Black;<sup>721</sup> the poverty rate for Black families is three times that of the majority—the

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their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . .” (quoting Oliver Wendell Holmes, Speech, *The Path of the Law After One Hundred Years: The Path of the Law* (Jan. 8, 1897), reprinted in 110 HARV. L. REV. 991, 999 (1997)).

<sup>719</sup>MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 9 (2000).

<sup>720</sup>See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-26 (1960); see also Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133 (1999) (describing disenfranchisement of Black children beyond de jure segregation).

<sup>721</sup>ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, BROWN V. BOARD

unemployment rate for Black men is double;<sup>722</sup> nearly half of working age Black men in New York City were recently unemployed;<sup>723</sup> ninety percent of those sentenced under New York's draconian "Rockefeller Drug Laws" are Black or Hispanic.<sup>724</sup> Perhaps most troubling to those who hailed *Brown*, school segregation continues and, in some cases, is increasing.<sup>725</sup> Re-segregation is rising. New York appears to some to be the most segregated state in the country, for both Black and Hispanic public school students.<sup>726</sup>

In my court, I confronted the quandary of segregated schools first in the early 1970s.<sup>727</sup> I ordered a magnet school plan for Mark Twain Junior High School in Coney Island with a goal of full and real integration. That case—which was brought some twenty-five years after *Brown*—confronted the same community fears and resistance faced by the plaintiffs in Topeka, Kansas.<sup>728</sup> A few years ago, the New York City Board of Education settled a case in my court

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OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 237 (2003).

<sup>722</sup>*Id.*

<sup>723</sup>Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1.

<sup>724</sup>HUMAN RIGHTS WATCH, *CRUEL AND UNUSUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS* (1997), <http://hrw.org/reports/1997/usny/> (last visited Nov. 8, 2007).

<sup>725</sup>ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, HARVARD CIVIL RIGHTS PROJECT, *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* (2003).

<sup>726</sup>*See id.*

<sup>727</sup>*See, e.g., Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 769, 770-71 (E.D.N.Y. 1974).

<sup>728</sup>Judge Joseph C. Zavatt faced somewhat the same prejudices in a rich Long Island suburban community with a ghetto community in *Blocker v. Board of Education of Manhasset*,

involving the alleged “pushing-out” of high school students, predominantly African-American and Hispanic.<sup>729</sup> Public schools, under increased pressure to improve reported performance on standardized tests and other so-called objective measures, summarily dropped underperforming students from the rolls. The settlement agreement included much-needed provisions for additional support services for those students most at risk for failure. While helpful, such settlements fail to treat comprehensively the serious systemic ills of our schools and of society.

#### Inequality in Fact Abetted By Law

We have an almost indigestible mass of youngsters—not all, of course—who cannot take advantage of theoretically equal legal opportunities because of real life discriminations.

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*N.Y.*, 226 F. Supp. 208 (1964). He simply closed the local ghetto school, which was one percent White and had a rigid no-transfer policy, and sent all the children to the integrated highly successful central schools.

<sup>729</sup>*R.V. v. N.Y. City Dep’t of Educ.*, 321 F. Supp. 2d 538, 541-42 (E.D.N.Y. 2004). Resolution of these cases will not solve the deep-seated socioeconomic, political and educational issues that underlay failures of our educational system. But, on the fiftieth anniversary of the historic *Brown v. Board of Education* case, it was a fitting reminder that the American struggle for education excellence for all—a *sine qua non* of equality of opportunity—goes on, and with some success. *Id.* at 539; *see also* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 751-89 (rev. ed. 2004) (summarizing post-*Brown* developments); JACK GREENBERG, *CRUSADER IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* (Anniversary ed. 2004); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003); GARY ORFIELD & SUSAN E. EATON, with a forward by Elaine R. Jones, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* (1998); ROBERT L. CARTER, *THIRTY-FIVE YEARS LATER: NEW PERSPECTIVES ON BROWN* 83 (1993); OLIVER W. HILL, *THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND* (2000). *But see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Tresa Baldas, *School Suits: Educators Face a Variety of Legal Claims, Spurious or Not*, NAT’L L.J., May 17, 2004, at C1 (“A fear of lawsuits has gripped the nation’s schools, creating a power struggle between the courts and educators, who say they have been forced into a defensive teaching mode.”).

The peer pressure against educational achievement prevalent among young, mostly poor people in some communities is disturbing and hard to overcome. This “oppositional culture” is in part an outgrowth of the struggling, under-financed and still-segregated public school systems.<sup>730</sup> It is also a continuing artifact of centuries of pervasive discrimination and segregation. Only increased integration—both economic and racial—will help meet *Brown*’s promise.

Reflecting back to what I said about standing requirements burdening the aggrieved, consider *Allen v. Wright*,<sup>731</sup> where Black parents complained that tax exemptions for all-White private schools were leading to government supported segregation and lack of state support for the public all-Black schools. A majority of seven, Justice Brennan dissenting, and Justice Marshall taking no part, found lack of standing. The effect on the real substantive law, on the merits, was devastating.

As Richard Kluger’s 2004 revision of his book *Simple Justice* demonstrates, the Supreme Court’s recent decisions have helped block real progress towards equality in the schools,<sup>732</sup> by prohibiting such changes as busing and breaking down of political boundaries between urban and suburban school districts. Some approaches (despite Supreme Court inhibitions) may prove useful: small supervised charter schools; New York City’s plans to

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<sup>730</sup>See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 280 (1999); Sheryll D. Cashin, *American Public Schools Fifty Years After Brown: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 355 (2004).

<sup>731</sup>468 U.S. 737, 753-54 (1984); see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 126-42 (5th ed. 2003) (outlining various problems on standing to sue).

<sup>732</sup>RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (rev. ed. 2004).

divide large high schools into smaller specialized schools;<sup>733</sup> increased funding for preschool, after-school, and summer enrichment programs; expectations-raising measures—such as testing with increased individual tutoring; the ending of social promotion—even though that plan has serious risks; the participation of religious and other social institutions in the mentoring and support of parents, whose participation is crucial; integration by magnet schools—particularly across city and county borders; grading of schools; and school choice or school voucher plans. Money and resources are needed.<sup>734</sup> The United States Civil Rights Commission has, incomprehensibly, now turned its face from integration.<sup>735</sup>

Elimination of segregated housing goes hand-in-hand with desegregated schools. Even when housing discrimination issues are extensively litigated to prevent illegal segregation, they tend to recur with ghettoization.<sup>736</sup> It is not necessary to dilate on the relation between segregated in fact housing and other problems of minorities such as poor schools. Judge

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<sup>733</sup>Elissa Gootman, *City's Small Schools Uneasy Inside the Big Ones*, N.Y. TIMES, Apr. 14, 2004, at A1.

<sup>734</sup>*See, e.g.*, Sam Dillon, *Schools Scramble for Teachers, Retirements and Stress Hit Poor Classrooms*, N.Y. TIMES, Aug. 27, 2007 (reporting that poor pay leads to less qualified teachers for poor schools).

<sup>735</sup>*See* Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, BOSTON GLOBE, Nov. 6, 2007 (by placing six conservatives on the Civil Rights Commission, the President has turned it away from its mission, protecting the rights of minorities; it now finds little educational benefit to integrating elementary and secondary schools). The conclusion of the Commission runs counter to my own observations.

<sup>736</sup>*See, e.g.*, Fernanda Santos, *Inquiry into Police Opens Old Wounds in Yonkers*, N.Y. TIMES, Aug. 31, 2007, at B2 (describing how the “president of the N.A.A.C.P. chapter in Yonkers, forwarded . . . [a] complaint to the Justice Department, which had sued the City in 1980 for its inequitable housing policies and is now investigating its police” for violence and discrimination against minorities).

Zavatt’s Manhasset decision, my Mark Twain decisions, and Judge Sand’s White Plains decisions all attest to the problem. Despite legislative and judicial attempts to reduce segregation in housing, poverty’s realities force the poor, mainly Black and Latino, to live apart from the gentrified.

Judge Denise Cote, one of my former clerks, put the matter bluntly, holding that Westchester County may have defrauded the federal government when it received federal funds by falsely certifying that it would “affirmatively further fair housing” while at the same time refusing to “consider the existence and impact of race.” Judge Cote found that an interpretation of the phrase “affirmatively furthering fair housing” that excludes “consideration of race would be an absurd result.”<sup>737</sup>

Because problems of schooling are closely tied to local housing, and ethnic and social problems, and are so vexing even with the best of motives, experimentation on a local level is vital. New techniques are designed to reduce rather than to enhance segregation should be encouraged. I think of Judge Sand’s struggle, fully supported by the Court of Appeals for the Second Circuit, to desegregate White Plains’s housing and schools, my own efforts with Mark Twain in Brooklyn, and Judge Zavatt’s in Manhasset in Nassau County which helped provide better schooling for minorities. Such efforts now must be reconsidered and perhaps scaled back because of the Supreme Court’s current wooden school decisions.<sup>738</sup>

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<sup>737</sup>United States v. Westchester County, 495 F. Supp. 2d 375, 376, 388 (S.D.N.Y. 2007).

<sup>738</sup>Linda Greenhouse, *Justices, 5-4, Limit Use of Race for School Integration Plans, A Bitter Division, Court Rejects Programs of Type Used Widely Across the Nation*, N.Y. TIMES, June 29, 2007, at A1; Chris Kenning, *Schools’ Course Since Race Ruling, Ok’d*, COURIER J., Aug. 3, 2007 (abandonment of race desegregation program approved by lower federal court); Jonathan Kozal, *Transferring Up*, N.Y. TIMES, July 11, 2007, at A19 (Supreme Court decision

Distressing reading is provided by the Supreme Court’s majority opinion in *Parents Involved in Community Schools v. Seattle School District*.<sup>739</sup> The case was decided with *Meredith v. Jefferson County Board of Education*.<sup>740</sup> The Court—five to four—struck down a student assignment plan that relied upon racial classification to allocate slots in schools that were oversubscribed because they were believed by students and parents to provide a better education than schools in ghetto areas. The majority took the position that any classification on the basis of race was improper under the Constitution. It failed to recognize that these schools

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“came as a blow to those who have been watching the gradual dismantling of *Brown v. Board of Education* with despair.”); Nicholas Lemann, Comment, *Reversals*, NEW YORKER, July 30, 2007, at 27, 28 (“The country has slowly ratcheted back a host of policies aimed at the twin goals of black advancement and racial harmony, but it has not abandoned them—and, until now, neither has the Court.”); David Brooks, Op-Ed, *The End of Integration*, N.Y. TIMES, July 6, 2007; Joseph Goldstein, *New View of Brown v. Board Unlikely to Sway One Judge*, N.Y. SUN, July 9, 2007, at 4; Stanley Fish, Op-Ed, *History Principle and Affirmative Action*, N.Y. TIMES, July 14, 2007, at A11 (“[T]he underlying issue is whether the court should be attentive to history and the societal consequences of its decision, or should turn a blind eye to those consequences and attend only to the principled protection of individual rights.”); Jennifer Medina, *More Students Finish School, Given Time*, N.Y. TIMES, Aug. 21, 2007, at A1 (boost to ghetto children who tend to drop-out at much higher rates than suburban children); Joseph Berger, *A Successful Plan for Racial Balance [in White Plains] Now Finds its Future Uncertain*, N.Y. TIMES, Aug. 22, 2007, at B7; Tamar Lewin & David M. Verzenhorn, *Money Not Race, is Fueling New Push to Bolster Schools, Skirting Integration in Seeking Resources*, N.Y. TIMES, June 30, 2007, at A10; Editorial, *Roosevelt’s Rough Ride*, N.Y. TIMES, July 8, 2007 (“[S]eparation by race and class” on Long Island “leads to intense concentrations of poverty and disfunction in overwhelmingly black and Hispanic schools”). *But see* Eleanor J. Bader, *Lawyer’s Bookshelf*, N.Y.L.J., Aug. 1, 2007, at 2 (reviewing CRIME AND FAMILY: SELECTED ESSAYS OF JOAN MCCORD (Geoffrey Sayre-McCord ed., 2007)) (stating that emotional nurturing in family is more important than other factors in avoiding adult offenses). *But see* CHRISTOPHER JENCKS, ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 41 (1972) (“[Education] reforms are not likely to make students appreciably more equal after they finish school.”).

<sup>739</sup>Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007).

<sup>740</sup>*Id.*

were using racial classifications *to help, rather than*, as in pre-*Brown*, *to denigrate* Blacks.<sup>741</sup> It may be that the right to transfer from poorer to better schools under the No Child Left Behind Act will allow some Black children to transfer to better, more White schools, reducing somewhat the deleterious effects of the *Seattle* and *Jefferson* cases.<sup>742</sup>

Apart from ignoring what Justice Brandeis referred to as the advantages of the experimental laboratory of the states,<sup>743</sup> and local legislative knowledge of the required and the

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<sup>741</sup>Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, Sept. 27, 2007, at 92 (“The resulting racial isolation of young Americans at the beginnings of their lives is a national disgrace; that isolation perpetuates racial consciousness and antagonism in both blacks and whites. There is formidable evidence—Breyer cited much of it in a long and brilliantly argued dissent that Stevens called ‘unanswerable’—that the racial isolation has very serious educational disadvantages as well: black students do significantly better when they are not in either almost all-black schools or schools with very few blacks. Thomas, in a concurring opinion, cited contradictory studies, but *Seattle* and *Louisville* were certainly entitled to rely on the detailed and impressive evidence that Breyer cited.”).

<sup>742</sup>See Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1 (use of No Child Left Behind to circumvent rezoning plan concentrating Black and Whites).

<sup>743</sup>In *Gonzales v. Raich*, the Court recognized Congress’s authority under the Commerce Clause to outlaw marihuana when a state permits it for medicinal purposes. 545 U.S. 1, 42 (2005). Dissenting, Justice O’Connor argued that “[t]his case exemplifies the role of States as laboratories,” citing Justice Brandeis in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932). *Id.* at 55 (O’Connor, J., dissenting). She continued:

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: “The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” THE FEDERALIST NO. 45, at 292-293 (C. Rossiter ed., 1961).

*Id.* at 57.

practicable, the *Seattle School* decision corrodes *Brown* by preventing desegregation in fact by school district’s seeking to remedy real-on-the-ground problems.

The *in terroram* slippery-slope argument of the Chief Justice was that “[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society . . . .”<sup>744</sup> That legislatures would adopt such a rule as the Chief Justice suggests—or could make it stick—verges on the absurd. It involves the memory of arguments favoring miscegenation laws such as, “Would you want your daughter to marry a Black man?” The extended attempt by the majority to meet Justice Breyer’s fact-based dissent<sup>745</sup> is unconvincing.<sup>746</sup>

Justice Kennedy, concurring in part with the majority, rejected “an all-too-unyielding insistence that race cannot be a factor” in local decision-making.<sup>747</sup> In effect, it seems he might allow pragmatic local decisions to avoid narrowing of educational opportunities for all—the same considerations applied at the college level.<sup>748</sup>

I find it difficult to disagree with Justice Breyer that the plurality opinion in the *Seattle case* “reverses course and reaches the wrong conclusion.”<sup>749</sup> As he summarized the matter:

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<sup>744</sup>Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2757 (2007).

<sup>745</sup>*Id.* at 2761-68.

<sup>746</sup>*See also id.* concurrences by Justices Thomas, at 2768-88, and Kennedy, at 2788-97.

<sup>747</sup>*Id.* at 2791 (Kennedy, J., concurring).

<sup>748</sup>*See, e.g.,* Gutter v. Bollinger, 539 U.S. 306, 334 (2003).

<sup>749</sup>Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

[I]t distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.<sup>750</sup>

Justice Breyer's warning at the end of his dissent in the *Seattle* schools case might have been uttered by Lincoln. He declared:

[T]he very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have face . . . . [T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments . . . they believe are needed to overcome the problems of cities divided by race and poverty . . . . The last half-century has witnessed great strides towards racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten [*Brown's* promise] . . . . This is a decision . . . the Court and the Nation will come to regret.<sup>751</sup>

Ideas and grand plans are not enough. Increased funding at the national and state levels is required.<sup>752</sup> Already the much-touted "No Child Left Behind" program is suffering from a lack of money.<sup>753</sup>

#### Equality in Fact Encouraged By Law

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<sup>750</sup>*Id.* at 2800-01.

<sup>751</sup>*Id.* at 2785 n.21, 2837.

<sup>752</sup>*See, e.g.,* Sam Dillon, *Schools Scramble for Teachers Because of Spreading Turnover*, N.Y. TIMES, Aug. 27, 2007 (reporting how low pay is causing teachers to leave or not apply for jobs; some ghetto schools have no certified applicants).

<sup>753</sup>Diana Jean Schemo, *Kennedy Demands Full Funding for School Bill*, N.Y. TIMES, Apr. 7, 2004, at B9; *cf.* Sam Dillon, *Democrats Try to Soften Bush's Education Law*, N.Y. TIMES, Sept. 1, 2007, at A9 (attempt to soften accountability provisions while maintaining the "strategic goal: to bring every student to proficiency by 2014").

Despite disappointments, too often we fail to acknowledge the good accomplished by *Brown*. It has provided opportunity for millions of Americans, assisting in the creation of a flourishing stable and growing Black and Latino professional and middle class. Our eyes can see the changing color of the legal profession.

We can harken back to Lincoln’s 1854 speech on the Missouri Compromise delivered in response to Senator Stephen Douglas.<sup>754</sup> Paraphrasing by substituting the words “segregation and denigration in fact” for the word “slavery,” this passage from Lincoln could be adopted by many who are frustrated by *Brown*’s unrealized potential:

This *declared* indifference, but, as I must think, covert *real zeal* for the spread of [segregation and denigration in fact], I can not but hate. I hate it because of the monstrous injustice . . . itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest.<sup>755</sup>

If we are to survive as that great nation of liberty, rededicated by Lincoln at Gettysburg and each day in our courts, it is as a model of the rule of law: the ideals of real democracy for all, real equality for all, and real opportunity for all must continue to be our dream, our goal, our daily task. How fortunate that we as lawyers have lived through these years when the law could, and did, make a difference in improving the lives of so many. How blessed to be able, still, to be guided by *Brown*, one of the landmarks in our continuing journey together towards

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<sup>754</sup>ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 291 (Roy P. Basler ed., 2d ed. 2001).

<sup>755</sup>*Id.* (emphasis in original).

equality and freedom for all. How fortunate that we have dedicated, tenacious present and future lawyers and judges, to carry on the struggle.

Without a full education we cannot have a government either “by” or “for” the people.<sup>756</sup>

A child brought into this country illegally as an infant who graduates from high school is now sometimes, because of status alone, denied loans for college. His or her route to escape from poverty is only through the armed forces and Iraq.<sup>757</sup> There are believed to be over ten million non-documented immigrants here, most of whom will remain in this country. Their children should be fully educated so that they can become fully integrated into our society if they stay here.

*Metropolitan Louisville* and other opinions of the Supreme Court of this term<sup>758</sup> demonstrated regression after *Brown*. Decisions by the Supreme Court are preventing integration and the full education of the minority communities which are essential to equalization and full participation in the government.

One way of dealing with the matter suggested by Justice Kennedy is through the surrogate of socio-economic classifications. If massive additional schooling help was given to the poor and the disadvantaged we might achieve somewhat the same effect as a policy of help

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<sup>756</sup>See Justice Marshall’s dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111-15 (1972).

<sup>757</sup>Enlistees are promised a bonus plus college. U.S. Army Benefits, <http://www.goarmy.com/benefits/index.jsp> (last visited Nov. 8, 2007). I do not object to a bonus for veterans. The GI bill after World War II enabled me to go to law school. Before World War II I had a free monthly night school education at the City University of New York’s Baruch College.

<sup>758</sup>See N.Y. TIMES, June 29, 2007, at A24 (listing of the cases).

based partly upon race. A great deal more money than is presently available would have to be put into the education system.

The courts, the legislature, the executive, and the people are avoiding a central problem. In order to equalize educational opportunity enormous injections of resources need to be made into the school system through increased salaries and training of teachers and various devices like specialized pre-schooling, after-school programs, longer terms, smaller classes and schools, and the like with which we are beginning to experiment.

Yet, the Supreme Court majority has cut-off efforts to improve schooling through application of new resources to meet special problems of minority students. Its 1973 *San Antonio*<sup>759</sup> decision holding that there is no constitutional right to economic help to equalize educational opportunities was also a serious blow to equalization.

“No Child Left Behind” will be a mirage until we are willing to put enormous sums into the educational system. Basing payment for education on local property taxes invariably will lead to a poor education for many of the poor because so many of them live in poor communities which cannot afford high quality education based on local property taxes.

A number of the states, including New York and New Jersey, have attempted partial economic equalization of state appropriations to individual school districts requiring additional expenditures of huge sums.<sup>760</sup> In this, as in other matters, we are talking about required changes to human infrastructure that are enormously costly. We put trillions into war; were some of that

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<sup>759</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973) (finding wealth not a suspect classification in financing school districts, with Justices White, Douglas, Brennan and Marshall in dissent).

<sup>760</sup> *See, e.g., Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893 (2003).

money used for improving infrastructure in schools and equal health benefits, we could make a difference in equalization of effective rights in the United States. But our society is not yet willing to face the main problems of inequality in fact. Our courts have either been reluctant to assist or have been counter-productive in approaching the problems. More recent opinions have stymied integration necessary for better minority education.

Without help for the poor at the cradle, pre-school, grade school, college and law school, a fully integrated legal profession is impossible—too many of the disadvantaged are disqualified at birth. It seems anomalous for the Supreme Court to allow colleges to provide affirmatively for diversity<sup>761</sup> and to reject the same freedom for local grade school boards. This is particularly ironic since the strategy of the NAACP was to try to desegregate grade schools by starting with professional schools and colleges.<sup>762</sup>

In a recent series of cases the New York City Department of Education has been sued for pushing out of school “difficult students.” In approving one settlement agreement protecting Black and Hispanic children forced out of high school, I wrote, with supporting citations:

Resolution of these cases will not solve the deep-seated socioeconomic, political and educational issues that underlie failures of our educational system. But, on the fiftieth anniversary of the historic *Brown v. Board of Education* case, it is a fitting reminder that the American struggle for educational excellence for all—a

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<sup>761</sup>See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1979); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 546 (16th ed. 2007) (note on meaning of *Grutter* and *Gratz*); see also Aasia Mustakeem, *The Challenge of Diversity Begins with Law School: Professionals Could Do More to End the Decline in Minority Enrollment*, NAT’L L.J., Oct. 8, 2007, at S3 (minority enrollment consistently on downward path).

<sup>762</sup>See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 632 (1950); *McLaurin v. Ok. State Regents*, 339 U.S. 637, 639 (1950); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337, 342 (1938).

*sine qua non* of equality of opportunity—goes on, and with some success. *See, e.g., Brown v. Bd. of Educ. Of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”); *Hart v. Community Sch. Bd. of Brooklyn*, 383 F. Supp. 699 (E.D.N.Y. 1974) (finding that school had been unconstitutionally segregated); Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 751 ff. (Rev. Ed.2004) (summary of post-*Brown* development); Jack Greenberg, *Crusader in the Courts: Legal Battles of the Civil Rights Movement* (50th Ann. ed.2004); Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (2004); Robert Cottrol, Raymond T. Diamond & Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution* (2003); Lee Cokorinos, with an Introduction by Theodore M. Shaw, *The Assault on Diversity* (2003); Gary Orfield & Susan E. Eaton, with a forward by Elaine R. Jones, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996); Harvard Law School, *Materials for the Celebration of Fiftieth Anniversary of Brown v. Board of Education* (2004); Constance Baker Motley, *Equal Justice Under the Law* (1998); Robert L. Carter, *Thirty-Five Years Later: New Perspectives on Brown* (1993); Oliver W. Hill, *The Big Bang: Brown v. Board of Education and Beyond* (2000). *But see* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Tresa Baldas, *School Suits: Educators Face a Variety of Legal Claims, Spurious or Not*, Nat’l L.J., May 17, 2004 at 1 (“A fear of lawsuits has gripped the nation’s schools, creating a power struggle between the courts and educators, who say they have been forced into a defensive teaching mode.”).

Although the Supreme Court has held that education is not, for federal constitutional purposes, a fundamental right, *see San Antonio Ind. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973), it is universally acknowledged that good schooling for all is essential in a republic, particularly one engaged in global competition for minds and dollars. In New York State, the right to public education is enshrined in its constitution. *See* N.Y. Const. Art. XI § 1; *Campaign For fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893, 901, 801 N.E.2d 326, 328, 769 N.Y.S.2d 106, 108 (2003) (“We begin with a unanimous recognition of the importance of education in our democracy. The fundamental value of education is embedded in the Education Article of the New York State Constitution.”). It is embraced by the state’s educators and leaders. *See, e.g.,* Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2004 at A1 (quoting Deputy Mayor: “For any child being pushed out, we need to correct that problem, we need to fix it as soon as possible.”).<sup>763</sup>

In the 1970s and 1980s I spoke out for open admissions to our City’s colleges—a plan

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<sup>763</sup>R.V. v. N.Y. City Dep’t of Educ., 321 F. Supp. 2d 538, 539-40 (E.D.N.Y. 2004).

that provided a free college education for me.<sup>764</sup> That system of admission with remedial courses for incoming unprepared students was reviled by teachers used to the more elite students of the thirties. Yet, for many students open admissions was the path to success as members of the middle class.<sup>765</sup>

Recall Lincoln's haunting Second Inaugural reminder that our burdens from slavery may be required to be borne "until all the wealth piled by the bonds-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn by with the lash shall be paid."<sup>766</sup>

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<sup>764</sup>Jack B. Weinstein, Address at Brooklyn College Commencement: Equality and Excellence, The Need to Improve College Opportunities for Black and Puerto Rican People in the City of New York (June 1969).

<sup>765</sup>See William Crain, *New Test Rules Fail CUNY's Mission*, N.Y. DAILY NEWS, Aug. 12, 2007.

Many students achieved stunning success. For example, a National Research Council report revealed that between 1983 and 1992, in the heart of the open admissions era, 860 City College graduates earned Ph.D. degrees—a higher number than that for City College's prestigious neighbor, Columbia. But the critics won. In 1999, the CUNY Board of Trustees banned remedial courses in the senior colleges and mandated standardized test cutoff scores for admission. CUNY officials claim that the 1999, test-dominated admission policy has been a success, so CUNY can safely raise the test cutoff scores now. But since 1999, three of CUNY's "elite" senior colleges—City, Hunter and Baruch—have suffered sharp declines in percentages of black undergraduates. CUNY research shows that between 1999 and 2006, City College experienced a 12-point drop. Hunter and Baruch experienced 5- and 10-point declines, respectively. At the senior colleges overall the numbers of black students have remained flat while the numbers of other ethnic groups have grown.

*Id.*

<sup>766</sup>ABRAHAM LINCOLN, Second Inaugural (1865), reprinted in ABRAHAM LINCOLN, HIS SPEECHES AND WRITINGS 793 (Roy P. Basler, ed., 2001); cf. Amy Harmon, *In DNA Era, New Worries About Prejudice*, N.Y. TIMES, Nov. 11, 2007, at A1 (environmental factors rather than

We have only partially paid for the sins of slavery and its aftermath, segregation and discrimination. Nor have we shared with those less fortunate the fruits of archaic to modern social and technological advances spread throughout the world by our homo sapiens progenitors beginning only a few hundred thousand years ago. This is the patrimony of all humanity from which our present riches are mined.

### Property Rights: Condemnation, Zoning and Conservation

Property rights are central in our society. Their definition affects how we can finance schools, control the environment, encourage expansion, and satisfy the need of homeowners and others for security and stability.

The legal problem of individual property rights versus the public's needs presents a fundamental question that dates back at least to medieval times. It involves the right of the sovereign—we the people, successor to the king—to have ultimate control over all land, air, and electric airwaves. In a sense, it raises the fundamental conflict between a welfare and a capitalist state. We opted in the Constitution and since Hamilton to tilt strongly towards freedom to acquire, hold and use land and other private property, but we have never abandoned concern for our fellow's welfare and the ultimate people's sovereign control of the country's resources exercised through condemnation, zoning, and restrictions on use.

The Supreme Court was right in *Kelo v. City of New London, Connecticut*,<sup>767</sup> in allowing

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“race” seem to account for far more aspects of IQ but differences may require more educational assets to achieve equality of opportunity).

<sup>767</sup>*Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

condemnation for private-public purposes.<sup>768</sup> But it is less sound, I believe, in unduly limiting the use of zoning and environmental controls to protect the land, wetlands and use by the community, even though those controls act, in effect, as a partial condemnation of the property in-so-far as they reduce value—*i.e.*, market price for “the highest and best” use.<sup>769</sup>

The limited right of property owners was first brought to my 1940s law school class’s attention by the conservative professor of property at Columbia Law School, Richard Powell, who taught us that real property ownership consisted of a bundle owner’s rights and obligations, subject to considerable control by the state.<sup>770</sup> Particularly as humanity’s domination of earth creates growing environmental problems, we constantly have to rethink and to redefine that

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<sup>768</sup>See David Schultz, *Comprehensive Plans, Corporate Thuggery and the Problems of Private Takings*, 9 N.Y. ST. B.A. GOV. L. & POL’Y J., Sp. 2007, at 6 (“[T]hose closely following eminent domain law should not be surprised by the Court ruling that the government could take a private home or property for economic development reasons and transfer it to another. The real shock, if any, was in the reaction to the *Kelo* decision and the fact that it illuminated two questions surrounding condemnation law. First, is there any way left to distinguish public from private uses? (Almost none) Second, how can we prevent eminent domain from being used on behalf of corporate interests to advance their private interests? *Kelo* answered the first question yet failed to address the latter”). The answer to the second relies upon legislative and court control with votes and media vigilance. See also Andrew Jacobs, *Judge Stops Newark Redevelopment Project*, N.Y. TIMES, July 20, 2007 (judge kills large redevelopment project relying on condemnation because of political connections between mayor and developer); Ilya Somin, *The Limits of Anti-Kelo Legislation*, REASON, Aug./Sept. 2007 (while 81% of Americans opposed *Kelo*, state legislation designed to curb condemnation seems dubious).

<sup>769</sup>See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 395-408 (16th<sup>th</sup> ed. 2007 (note on regulatory “takings”).

<sup>770</sup>Cf. Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant’s Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, FED. LAWYER, Oct. 2007, at 30, 31 (“Property, in the constitutional sense, is frequently described conceptually as a ‘bundle of sticks,’ with each stick in the bundle representing a different right that is inherent in the ownership of the physical thing that we typically think of as property, such as a ‘parcel of land.’”).

bundle of property rights to achieve a fair balance between the needs of the community and those of individual property owners.

Attacks on *Kelo v. City of New London, Connecticut*, seem excessive.<sup>771</sup> The decision properly recognizes the balanced subservience of individual property rights to society's needs, and the need to pay fair prices for forced takings. To the extent that zoning and other legislation affecting the environment have to be paid for in full as "takings," control by the public in the interest of today's and tomorrow's environment often becomes too expensive to consider.<sup>772</sup>

Potential devastating changes created by warming waters and atmosphere with attendant

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<sup>771</sup>See, e.g., Symposium, 9 N.Y. St. B.A., GOV., LAW & POL'Y J. 1 (2007); Timothy J. Dowling, *Kelo as Trojan Horse: How the Property Rights Movement Is Missing the Kelo Decision to Advance a Radical Agenda*, FED. LAWYER, Oct. 2007, at 46.

<sup>772</sup>Jack B. Weinstein, *Why Protect the Environment for Others*, 77 ST. JOHN'S L. REV. 217 (2003); see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 11 (15th ed. Supp. 2006 & 16th ed. 2007) ("May Congress, within the meaning of the commerce power, regulate seasonal streams and intermittent wetlands that are not themselves part of the nation's navigable waterways? In *Rapanos v. United States Army Corps of Engineers*, 126 S. Ct. 2208 (2006), the Court did not reach the constitutional question of the breadth of Congress's power to protect the environment, but offered a narrowing construction of the term 'waters' in the Clean Water Act that some Justices suggested was necessary to avoid that constitutional question. The Act prohibits certain discharges into 'navigable waters,' defined as 'the waters of the United States.' Army Corps of Engineer regulations interpreted such waters to include 'wetlands adjacent to' such waters even if only intermittently wet . . . . Writing for a plurality of the Court in *Rapanos* and consolidated cases, Justice Antonin Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, opined that the Corps' interpretation exceeded its authority under the Act: '[W]e consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act. . . . [The term] 'the waters' refers . . . to water 'as found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.' WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954). On this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water . . . as opposed to ordinarily dry channels through which water occasionally or intermittently flows."').

flooding, fierce fires and droughts make today's limited efforts to reduce nature's calamities and compensate for them by land restrictions seem almost puerile.<sup>773</sup>

## Torts

The subject of torts is crucial in providing “for” the people because they should be able to use the law in order to be compensated for their private injuries. It is important to recall that central theme of our legal system: *ubi jus, ibi remedium*—every violation of a right should have a remedy in court.

### Right to Compensation

Tort law is our primary fall-back method of empowering ordinary people to remedy injustices to themselves through their courts.<sup>774</sup> In contrast with the top-down bureaucratic method operating through administrative agencies (such as most states' workers' compensation schemes), tort law is a lawyer-assisted, bottom-up compensating technique administered by the courts.

Since ancient historical developments replaced private vengeance,<sup>775</sup> through its English development based on ever-expanding post-medieval British King's jurisdiction shifting writs,

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<sup>773</sup> See Aaron C. Davis, *Schwarzenegger Orders Wildfire Review*, BOSTON GLOBE, Nov. 6, 2007 (Governor Schwarzenegger, after serious wildfires in California, ordered a review of whether “construction should be allowed in fire-prone areas”).

<sup>774</sup> While there is much disagreement as to the boundaries and definitions of torts, I adopt that in PROSSER & KEETON, ON TORTS 5-6 (W. Page Keeton et al., eds., 5th ed. 1984) (fn. omitted): (“There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one required. This is the law of torts.”).

<sup>775</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2, 34 (Little, Brown & Co. 1923) (1881).

tort law has become the basic common law remedy for compensating those injured by negligence or reckless conduct. It is an individual compensation scheme for the injured that also serves society as a method for deterring unsocial conduct. Being largely judge-made in origin, it can be molded by courts as well as legislators to meet new situations.<sup>776</sup>

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<sup>776</sup>In the fifty years after Cardozo became a member of the New York Court of Appeals in 1914, there were:

[M]any and substantial changes in negligence law, and even greater ones are in prospect. The adoption of a new principle of strict liability, as opposed to liability based on negligent omission or commission, in workmen's compensation laws adopted since 1911, has had a profound effect on the law of negligence itself; the same social necessity which brought about that statutory innovation has affected and influenced both statutory and judge-enunciated law in this field.

Clearly discernible, among many revisionary trends, have been the imposition of higher standards of care; greater reliance on circumstantial evidence and *res ipsa loquitur*; the expansion of the "last clear chance" doctrine; broader standards of foreseeability; less reliance on contributory negligence to defeat recovery; the increasing recognition of damage caused by emotional distress; the broadening of products liability, and liability for the results of negligence in building and construction; more humane standards of duty to trespassers, and legal recognition of the need to protect children against the consequences of their own childish carelessness; recognition of liability for prenatal injury and for the intentional infliction of mental suffering; and the broadening of vicarious liability for negligence.

JOSEPH T. MIRABEL & HERBERT A. LEVY, *THE LAW OF NEGLIGENCE* 69-70 (1962); *see also* Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363 (1965) ("We have come a long way from *MacPherson v. Buick Motor Company*. The great expansion of a manufacturer's liability for negligence since that case marks the transition from industrial revolution to a settled industrial society. The courts of the nineteenth century made allowance for the growing pains of industry by restricting its duty of care to the consumer."); *id.* at 376. ("As we enter the computer age we are still far from solving the massive accident problems that began with the industrial revolution."); Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. R. 809, 809 (2007) ("Tort litigation framed the problem of clergy sexual abuse as one of institutional failure, and it placed that problem on the policy agendas of the Catholic Church, law enforcement, and state governments."). Applying equitable doctrines modifications in decrees based on class actions can meet new mass tort situations. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 237 F. Supp. 2d 297 (E. & S.D.N.Y. 2002) (Misallocation of resources to less seriously injured

As Professor Tidmarsh put the matter:

My suggestion is that torts must be understood as a system in perpetual process—forever indefinite and infinitely malleable in its precise theoretical, doctrinal, and practical manifestations—yet ultimately bounded in its possibilities. An eternal, indefinite struggle occurs, but it occurs within defined limits. The limits are these: Torts responds only to certain types of claims (claims of loss), it responds to loss only in a certain fashion (an adjudicatory process to reallocate loss), and its adjudicatory response to loss allocation can be invoked successfully when a defendant’s conduct has caused the loss (a “causal model” for loss allocation), has breached community norms (a “community model” for loss allocation), or has done both (a combined “causal-community model” for loss allocation). This process approach views torts as an outer, empty shell within which an indeterminate struggle constantly regenerates the old face of tort theory, doctrine, and practice into the new.<sup>777</sup>

And Koenig and Rustad express the concept this way:

The power of the law of torts lies in its ability to adapt to changing social conditions. In the eighteenth century, torts compensated individuals injured by their neighbors. In contrast, in the 1970s and 1980s, mass tort law litigation evolved to compensate the victims of occupational exposure to toxic substances. . . .

The inherent flexibility of tort law allows it to mediate social inequities as they arise. Just as tort law protected less powerful individuals against King George III’s agents or from the excesses of abusive employees of the railroads, torts continue to evolve to meet the challenges of the new millennium. There is a logical continuity from the early cases against powerful aristocrats to the modern products liability cases against powerful corporate interests. The information age and advances in biotechnology create the opportunity for new forms of oppression, which must be controlled by tort law. Torts have consistently evolved to provide protection for the average citizen against entities too powerful to be constrained by lesser remedies.

Today, the tort system is under unremitting attack. Corporate America is calling for “reforms” that actually constitute a radical revision of the American civil justice system. It is difficult to think of one sub-field of tort law that has not been retrenched or reversed during the past two decades. The demand for further

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requires change in compensation plan).

<sup>777</sup>Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1317 (1994).

evisceration continues unabated.<sup>778</sup>

One great advantage of tort law is that a “claimant can insist that government provide her with the opportunity to pursue a claim of redress for the purpose of vindicating basic interests even if government officials are not inclined to do so.”<sup>779</sup>

Professor Goldberg—relying on a comprehensive analysis of the work of Blackstone and others (whose works influenced the Founders and Lincoln) as well as modern constitutional theory and practice—concluded that: “each state [has a duty] to provide a law for the redress of private wrongs.”<sup>780</sup> This principle “generates meaningful and judicially enforceable limits on tort reform legislation.”<sup>781</sup> He points to many of the Founders’ reliance on English writers of the

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<sup>778</sup>THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 67 (2001).

<sup>779</sup>John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 607 (2005). One example of this is actions against private persons assisting the government. Llan Margalit Maazel, *Civil Right Actions Against Private Actors*, N.Y.L.J., Oct. 1, 2007, at 3.

<sup>780</sup>John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005). The theoretical basis of much of this work is not without criticism. See, e.g., Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1562 (2006). But see John C. P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1580 (2006) (tort law is “about arming victims with a legal power to pursue those who have wronged them.”). In the valuable book, RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENTS* (2007), the author recognizes that “one important strand of scholarship defends tort law as an integral strand of democracy. *Id.* at 272 (citing John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005)). Professor Nagareda also recognizes litigation as a form of business enterprise. *Id.* at 273 (citing Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27 (2004)).

<sup>781</sup>John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 524 (2005).

time.<sup>782</sup> If I disagree at all with Professor Goldberg it is in my somewhat broader view of legislative power to provide equivalent administrative substitutes for tort remedies, *if they are effectively administered* to provide appropriate compensation to the aggrieved.<sup>783</sup> Tort reforms that reduce compensation disproportionately and place excessive barriers on recovery through complex procedures will not meet the constitutional right to individual compensation for tortious conduct.

### Protean Doctrine

In modern times tort law was sometimes regressive in its protection of the injured in order to favor economic expansion, as in the nineteenth and twentieth centuries when suits against railroads and other industries were barred on theories such as assumption of risk, negligence of coworkers, or contributing negligence.<sup>784</sup> Cardozo generally supported those restrictive doctrines. So harmful to workers was tort doctrine of the late nineteenth and early twentieth century that New York and other states adopted worker's compensation acts that insured for injuries on the job—legislation sometimes outlawed by courts on constitutional

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<sup>782</sup>*Id.* at 559-60. Lincoln was aware of Blackstone's views, having early on expended part of his very limited funds to purchase a second-hand copy of Blackstone's *Commentaries*. ABRAHAM LINCOLN, HIS SPEECHES AND WRITINGS 6 (Roy P. Basler, ed., 2001).

<sup>783</sup>*See generally* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION 1865-1920 378 (2001) ("Americans have never departed from the pattern . . . of speaking to the state through the language of injury and of individual liberty assured through restraint," enforced in large part by the courts through tort law).

<sup>784</sup>*See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 356 (3d ed. 2005); MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 210 (1977).

Fourteenth Amendment grounds.<sup>785</sup> Conservative rulings in New York led to a public outcry that in part explained Cardozo's choice by reformers for a judgeship.<sup>786</sup>

Many scholars in the New Deal period associated negligence tort law with laissez-faire rugged individualism and anti-worker case law. Compulsory automobile insurance and burden-shifting schemes as well as worker's compensation, anti-discrimination and Social Security disability laws, and protective administrative agencies have taken up part of the deterrence and part of the compensation loads.

Waivers of sovereign immunity at both the state and federal levels to allow claims for torts against the government have been important in providing a route to justice against government actors. The Supreme Court has, however, been skeptical about expanding constitutional torts of the *Bivens* variety against government employees.<sup>787</sup>

What is particularly intriguing about the amorphous and protean doctrines of tort law is how they have expanded to meet the problems of mass and other new torts by industry and government that adversely affect the lives of large numbers of people. Examples include toxic substances let loose on land and water, poisoning the community; substances such as herbicides and asbestos affecting large numbers of workers and others; pharmaceuticals that may affect many patients and their progeny adversely;<sup>788</sup> securities litigation based on frauds impinging on

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<sup>785</sup>See discussion of the *Ives* case in ANDREW L. KAUFMAN, *CARDOZO* 130 (1998).

<sup>786</sup>*Id.* at 130 ff.

<sup>787</sup>See, e.g., *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007) (dismissing *Bivens* action by private ranch owner for alleged retaliation against government Bureau of Land Management employees).

<sup>788</sup>See, e.g., Anita Bernstein, *Enhancing Drug Effectiveness Through Personal Injury*

the fairness of the stock market; misleading cigarette advertising that helped increase smoking which caused millions of premature deaths; poorly made or misdesigned products such as breast implants; and reform of large institutions such as prisons and schools that harm many.

In some instances, such as securities frauds, governmental agencies such as the Securities and Exchange Commission have taken over much of the definition of wrongs and enforcement administratively and through agency litigation in the civil and criminal courts.<sup>789</sup> In other instances the government has been forced to supersede tort law to protect important national policy as in the swine flu and children's vaccine statutes to induce manufacturers to produce an essential product, or to enact the atomic energy insurance provisions to make production of electricity by atomic plants possible.<sup>790</sup> Following the September 11, 2001 attacks, partly to save the airline industry, the tort rules were largely suspended; my long-term associate in teaching and litigation, Professor Kenneth R. Feinberg (former clerk to Judge Stanley Fuld), executed an administrative compensation scheme adopted by Congress in an

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*Litigation*, 15 J.L. & POL'Y 1051, 1100-01 (2007) (“[C]ourts could bolster the qui tam action to augment rewards for bringing ineffectiveness to public light, and courts and legislatures could encourage class actions that allege deception by drug manufacturers. Meanwhile, policy-minded judges mindful of the importance of supply must also bear in mind that each drug on the American market wrapped in false promises of therapeutic gain violates a law-based entitlement to effectiveness. This wrong ought to imply a right.”) (footnotes omitted); *see also* Margaret A. Berger, *Science for Judges VIII: Introduction*, 15 J.L. & POL'Y 983, 986 (2007) (“What Professor Bernstein seeks is a means by which prescription drug liability can play a positive role in improving the practices of the pharmaceutical industry. She makes the novel suggestion that courts consider ‘ineffectiveness’ as an actionable injury instead of tying liability solely to a lack of safety.”).

<sup>789</sup>Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal and Tort Law*, 2001 U. ILL. L. REV. 947, 963-66.

<sup>790</sup>JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 123, 169, 170, 304 n.12 (1995).

extraordinarily able way under unique circumstances.<sup>791</sup> Lawyers and private institutions have often substituted settlement for tort litigation.<sup>792</sup> The Federal Trade Commission, Federal Drug Administration and Consumers Protection Commission, and many other municipal, state and federal agencies have by regulation tried to prevent harms before they occurred.

### Mass Torts

But much has been left to judicial development of torts, primarily through common law decision and rule making. I need not expand on the issue as it affects complex litigations since I have addressed it so often.<sup>793</sup> There are two aspects that are of particular interest in the area of

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<sup>791</sup>KENNETH R. FEINBERG, WHAT IS LIFE WORTH: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005); *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 102-06 (2007).

<sup>792</sup>RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); *see id.* at 307, n.18 (“Helpful works untangling the tort and non-tort concepts in government reimbursement litigation against the tobacco industry include Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177 (2004) . . .”). Also see the excellent analysis in PETER H. SCHUCK, AGENT ORANGE ON TRIAL (enlarged ed. 1987) (describing a quasi-administrative scheme for administration of Agent Orange Settlement Funds, as well as the settlement negotiations and legal developments).

<sup>793</sup>*See, e.g.*, KENNETH R. FEINBERG & JACK B. WEINSTEIN, MATERIALS ON MASS TORTS (1991, 1992, 1993, 1994, 1995 eds.); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995); Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT’L LAW 165 (2001); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal and Tort Law*, 2001 U. ILL. L. REV. 947; Jack B. Weinstein, *Forward* to ERIC STALLARD, KENNETH G. MANTON, & JOEL E. COHEN, FORECASTING PRODUCT LIABILITY CLAIMS (2005); Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833 (1997); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001); Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & POL’Y 385 (2000); Roundtable Discussion led by Stephen A. Saltzburg, moderator, and comment by Jack B. Weinstein, *The Future of Class Actions in Mass Tort Cases*, 66 FORDHAM L. REV. 1657 (1998); Jack B. Weinstein, *Notes for a Discussion of Mass Tort Cases and Class Actions*, 63 BROOK. L. REV. 581 (1997); Jack B. Weinstein, *Preliminary Reflections on the Law’s Reactions to Disasters*, 11 COLUM. J. ENVTL. L. 1 (1986);

mass torts.

First, is an available substantive advantage to plaintiffs suing in a group or through class consolidations. If no one person can show by a preponderance of evidence that he was injured by a toxic substance or false claim, but demographics, epidemiology and statistics can demonstrate that some large number—say thirty percent—were injured by the substance and seventy percent by endogenous factors, the parties responsible should be ordered to pay thirty percent of the total damage they caused to be divided among the whole class. In some cases the courts must use a “fluid recovery” as in the nuclear plant litigation I conducted involving Long Island where the recovery against the Long Island Lighting Company had to be divided among past and present ratepayers.<sup>794</sup>

In general, the courts have shown a reluctance to accept this pragmatic, scientifically

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*In re Zyprexa Prod. Liab. Litig.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007) (and cases cited); *Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001), *rev'd in part and question certified* by 344 F.3d 211 (2d Cir. 2003), *answer to certified question conformed to sub nom.*, *Empire Healthchoice, Inc., v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004). *See Agent Orange* cases, collected in *In re “Agent Orange” Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 410-15 (E.D.N.Y. 2004); *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002) (class of abused women).

Essential in dealing with these dispersed mass cases is one or small number of cooperating judges, a single court, if possible a single law, and a single attorney or small group of attorneys on each side. My attempts to extend long-arm jurisdiction in these cases is only one example of the many adjustments needed in such cases. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *The City of N.Y. v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 411 *et seq.* (E.D.N.Y. 2007); *In re DES Cases*, 789 F. Supp. 552, 569-70 (E.D.N.Y. 1992).

<sup>794</sup>*County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (1990).

based position.<sup>795</sup> Failure of the appellate courts to accept the law of large numbers and statistical analysis to prove cause, knowledge and the like puts them more than a century behind science.<sup>796</sup>

Second, the procedural advantages by suing in a class or in consolidated actions are substantial to injured plaintiffs: jurisdiction in one court may be more easily obtained;<sup>797</sup> costs of

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<sup>795</sup>Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads*, 80 S. CAL. L. REV. 969 (2007) (criticizing the Court of Appeals for the Second Circuit's failure to use statistics in mass torts, and particularly in *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *appeal docketed sub nom. McLaughlin v. Philip Morris USA, Inc.* (2d Cir. Nov. 17, 2006)). Epidemiology and other statistical analyses have their difficulties. See Gary Taubes, *Do We Really Know What Makes Us Healthy, Much of What We're Told about Diet, Lifestyle and Disease Is Based on Epidemiologic Studies. What If It Is Just Bad Science?*, N.Y. TIMES MAG., Sept. 16, 2007, at 52; Drummond Rennie, *When Evidence Isn't: Trials, Drug Companies and the FDA*, 15 J.L. & POL'Y 991 (2007); Jonathan M. Samet, *Asbestos and Causation of Non-Respiratory Cancers: Evaluation by the Institute of Medicine*, 15 J.L. & POL'Y 1117 (2007); *McMillan v. Togus Regional Office, Dep't of Veterans Affairs*, 294 F. Supp. 2d 305 (E.D.N.Y. 2003) (limits of scientific studies), *aff'd*, 120 F. App'x 849 (2d Cir. 2005). See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002), *vacated and remanded*, 407 F.3d 125 (2d Cir. 2005).

<sup>796</sup>See, e.g., WALTER ISAACSON, *EINSTEIN: HIS LIFE AND UNIVERSE* 67-68 (2007) ("Kinetic theory spurred the growth of statistical mechanics, which describes the behavior of a large number of particles using statistical calculations. It was, of course, impossible to trace each molecule and each collision in a gas, but knowing the statistical behavior gave a workable theory of how billions of molecules behaved under varying conditions."); DAVID L. FAIGMAN, *LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW* (2004).

<sup>797</sup>See, e.g., *In re DES cases*, 789 F. Supp. 552 (E.D.N.Y. 1992); see also Amanda Bronstein, *A New Use for Consumer Class Actions, Usurping Personal Injury Claims*, NAT'L L.J., July 9, 2005, at 1; MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS, THE CHALLENGES OF MASS TOXIC SUBSTANCE LITIGATION* 237 ff. (1996) (aggregative Procedure in Mass Toxic Substance Litigation); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL, MASS TOXIC DISASTERS IN THE COURTS* 124 ff. (Enlarged ed, paperback 1987). A restrictive view of class actions by the federal Courts of Appeal has substantially reduced their value in mass torts. See, e.g., *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 3d 372 (5th Cir. 2007) (securities); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, (same). But see, e.g., *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (employee discrimination).

discovery, retention of experts and legal research and legal fees can be substantially reduced; and small consolidated claims that would not otherwise be viable can become worth a suit. Defendants can obtain peace against future claims so they can get on with their businesses.

Unfortunately, the courts have generally reduced the availability of class actions through restrictive decisions in the asbestos and other cases. Simultaneously, Congress somewhat expanded their reach in the Class Action Fairness Act by allowing consolidation of state and federal class actions in federal courts.

In some pharmaceutical cases, the federal Judicial Panel on Multidistrict Litigation transfers all the related thousands of federal cases in the country to one federal court. This pretrial consolidation can provide the basis for a quasi-class action. Discovery can be conducted nationally, with national archives accessible in state and federal cases through electronics. Matrices and advisers can fairly divide bulk settlements among claimants. And the court can limit fees and perceived lawyer abuses.<sup>798</sup>

The courts can do more in the common law tradition to effectively meet the claims of the many injured by modern life without unnecessarily burdening industry by unfair costs. Together

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<sup>798</sup>See, e.g., *In re Zyprexa Prod.* 489 F. Supp. 2d 230 (E.D.N.Y. 2007), 467 F. Supp. 2d 256 (E.D.N.Y. 2006), 433 F. Supp. 2d 268 (E.D.N.Y. 2006), 424 F. Supp. 2d 488 (E.D.N.Y. 2006), 238 F.R.D. 539 (E.D.N.Y. 2006), 233 F.R.D. 122 (E.D.N.Y. 2006); Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007 at A1 (47,000 “sets of plaintiffs” covered, subject to acceptance by 85%; attorneys to obtain about \$2 billion in fees; since most mass tort plaintiffs are part of the deal, opt-outs are not expected to be a problem; settlement was attributed in large part to Federal District Judge Eldon E. Fallon; a matrix for division of proceeds depends on severity of injuries and the time plaintiffs took Vioxx); cf. *Intern’l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372 (2007) (per curiam) (reversing class certification in a suit by third party non-governmental payers who allegedly overpaid for the prescription drug Vioxx).

with effective administrative agencies charged with helping consumers, judges can help make this a fairer and safer society for all.

### Restrictions on Remedy

Tort “reforms” in many states have limited the right to bring tort actions effectively.<sup>799</sup> Much of this restrictive doctrine is judge-made. Industry has, particularly through its influence on state legislatures, accelerated door-closing tendencies.<sup>800</sup> As Professor Goldberg has demonstrated, a fair method of restitution—or, I would add, social compensation—must be afforded to those injured by the negligence of others.<sup>801</sup> He and others have properly concluded that some of the so-called tort reforms reduce compensation disproportionately, arbitrarily and haphazardly.<sup>802</sup> Given the present lack of full welfare compensation, his conclusions seem

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<sup>799</sup>See, e.g., PETER H. SCHUCK, *TORT LAW AND THE PUBLIC INTEREST* 27, 39 (1991); see also Beth Bar, *Design-Defect Theory Upheld in [Light] Tobacco Suit*, N.Y.L.J., Aug. 8, 2007, at 1 (comparing state decision in *Fabiano v. Philip Morris*, No. 102715/04, allowing case to go forward with federal decision in *Mulholland v. Philip Morris*, No. 05-9908, dismissing similar action); 35 BNA PROD. SAFETY & LIAB. REP. 720 (2007) (Texas Appeals Court, based on state statute, throws out verdict for failure to show specific causation in asbestos suit); 22-13 MEALEY’S LITIG. REP.: ASB. 1 (2007) (Texas Court: Workers Must Show Dose Exposure to Particular Joint Compounds); 22-14 MEALEY’S LITIG. REP. ASB. 3 (2007) (Company: Texas Law Shielding Successors Is Constitutional, Fair). The rules have an effect. See Ralph Blumenthal, *After Texas Caps Malpractice Awards, Doctors Rush to Practice There*, N.Y. TIMES, Oct. 5, 2007, at A21.

<sup>800</sup>F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 538 (2006) (movement will continue despite its doctrinal problems because of self-interest of defense and its protectors).

<sup>801</sup>John C. P. Goldberg, *Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

<sup>802</sup>*Id.* at 623-26; see also CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW* (2001); Marcia Coyle, *State Lawsuits Against Railroads Have a New Life*, NAT’L L.J., Aug. 13, 2007, at 4.

sound.

Cardozo, himself, had a major role in creating the modern rule of tort law as a method of equalizing economic rights of all of our people. His *MacPherson v. Buick Motor Company*<sup>803</sup> decision recognized critical changes in technology and sociology. This opinion enabled innocent victims of negligence and recklessness by growing major industries and national commerce to seek compensation from the agents of their injuries without respect to a contract relationship.<sup>804</sup> In *Palsgraf v. Long Island Railroad Co.*,<sup>805</sup> Cardozo did circumscribe the scope of *Buick* through a highly criticized minority doctrine—foreseeability of the person who would be injured. With some sympathy for Ms. Palsgraf, a poor seamstress taking her daughter on the railroad for a rare outing at the beach, I think the plaintiff should have been entitled to sue when a poorly fastened object on railroad property fell on her after an explosion. But, the line has to be drawn somewhere; we cannot go back to Genesis relying on unrestrained “but for” cause.

Where state tort reforms have not sufficiently reduced available compensation, industry has increasingly turned to the doctrine of preemption to shift protection of consumers rights from the states to administrative agencies deemed more understanding of defendants’ views.<sup>806</sup>

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<sup>803</sup>*MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

<sup>804</sup>*See, e.g.*, RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 41-42 (1990) (“*MacPherson* . . . by greatly limiting the requirement of privity of contract in products liability cases . . . inaugurated fundamental changes in American tort law.”).

<sup>805</sup>*Palsgraf v. Long Island RR Co.*, 248 N.Y. 339 (1928).

<sup>806</sup>*See* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL’Y 1013 (2007); Eric Lipton & Gardiner Harris, *In Turnaround Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007; Cindy Skrzycki, *Trial Lawyers on the Offensive in Fight Against Preemptive Rules*, WASH. POST, Sept. 11, 2007, at D2.

In general, the courts have been sensible in limiting the preemption doctrine.<sup>807</sup> They have allowed state court tort law to continue in force where federal administrative agencies fall down on the job.<sup>808</sup>

Class actions, while exceedingly effective in resolving disputes over mass torts, have been limited in that they are more difficult to bring to a successful conclusion. Yet they are essential, I believe, for the fair treatment of large groups of people who need to consolidate their power in the courts in order to protect their rights, as well as for industry which needs to stop almost endless resource-sapping suits.

As a substitute for the court-constrained class action, we have begun to experiment with quasi-class actions in pharmaceutical cases. In the *Zyprexa* cases, for example, I helped: limit fees; set up a matrix for settlement utilizing four special masters; supervise discovery through a special master; set up a national depository of documents for state and federal courts; settle national claims for Medicaid and Medicare liens in state and federal cases (all in cooperation with state courts), thus treating some 30,000 individual Multidistrict Litigation settled cases in somewhat the same way as a national class action.<sup>809</sup>

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<sup>807</sup>See, e.g., *Marsh v. Rosenbloom*, 499 F.3d 165, 176-84 (2d Cir. 2007) (discussing preemption); Steven R. Pounian & Justin T. Green, *Federal Court Jurisdiction and the Aviation Case*, N.Y.L.J., Aug. 28, 2007, at 3 (courts are resisting attempts to exclude state tort law and state jurisdiction over aviation cases).

<sup>808</sup>Steven R. Pounian & Justin T. Green, *Federal Court Jurisdiction and the Aviation Case*, N.Y.L.J., Aug. 28, 2007, at 3 (courts are resisting attempts to exclude state tort law and state jurisdiction over aviation cases).

<sup>809</sup>See, e.g., *In re Zyprexa Prod. Liab. Litig.*, 375 F. Supp. 2d 190 (E.D.N.Y. 2005).

Nevertheless, the tendency of the appellate courts is to limit mass actions.<sup>810</sup>

Commentators have properly criticized this regressive tendency.<sup>811</sup>

### Sentencing<sup>812</sup>

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<sup>810</sup>See *In re Joint E. & S. Dist. Asbestos Litig.*, 798 F. Supp. 925 (E.D.N.Y. 1992), *rev'd* by *In re Joint E. & S. Dist. Asbestos Litig.*, 995 F.2d 343 (2d Cir. 1993) and *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, Discussion Draft No. 2, Apr. 6, 2007, p. xxv (reference to Supreme Court cases).

<sup>811</sup>See Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads*, 80 S. CAL. L. REV. 969 (2007). Mass Torts require as an amalgam of procedure and substance, use of statistics, law of large numbers and epidemiology permit liability to group where none can show injury by a probability of over 50% but chances that a large percentage was injured is clear. *But see* Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEG. ED. 503, 503 (1996) (“[T]he story of the last ten years in civil procedure is the slow but inexorable creep of ideas and solutions developed for complex cases into routine cases, and the continued effort of litigators and judges in complex cases to develop ideas and solutions that push the procedural envelope still farther out—thus setting the agenda for the next generation of procedural reform.”).

<sup>812</sup>This section is based in part on excerpts from an essay awaiting publication by Jack B. Weinstein and Christopher Wimmer. While I have often publicly expressed my opposition to capital punishment, I shall not discuss the subject because I am in the midst of considering a difficult capital punishment case before me. *See, e.g.*, Jack B. Weinstein, *Death Penalty: The Torah and Today*, N.Y.L.J., Aug. 23, 2000, at 2. These notes, which are oriented towards practice, only touch on the philosophy of punishment. My views on sentencing have been set out elsewhere in, *e.g.*, *United States v. Hawkins*, 380 F. Supp. 2d 143 (E.D.N.Y. 2005) (granting downward departure on basis of extraordinary rehabilitation); *United States v. Khan*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004) (considering benefits of advisory jury when sentencing a defendant whose milieu is distant from the judge’s); *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004) (explaining policy of video-recording sentencing hearings for appellate review); *United States v. Patterson*, 281 F. Supp. 2d 626 (E.D.N.Y. 2003) (granting downward departure for aberrant behavior); *United States v. Liu*, 267 F. Supp. 2d 371 (E.D.N.Y. 2003) (granting downward departure for significantly reduced mental capacity); *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412 (E.D.N.Y. 2002) (considering role of plea bargains in increasing prosecutorial power and subverting sentencing guidelines); *United States v. K*, 160 F. Supp. 2d 421 (E.D.N.Y. 2001) (deferring sentence for one year to permit 21-year-old non-violent first-time drug offender to demonstrate rehabilitation); *United States v. Blake*, 89 F. Supp. 2d 328 (E.D.N.Y. 2000) (granting downward departure on basis of significantly reduced mental capacity, aberrant behavior, anticipated trauma to defendant’s infant child if separated from mother, and rehabilitation); Jack B. Weinstein & Mae C. Quinn, *Some Reflections on the*

Lincoln had enormous burdens with sentencing in court-martial proceedings—many resulting in death sentences. His compassionate approach to sentencing could well guide us today where there is so much vindictiveness abroad. Because sentencing generally involves sending to prison the most disadvantaged and poor people of our society, in order for our government and the courts to be truly *for* the people, the sentencer must consider compassion to those being sentenced and their family members.

Criminal sentencing represents an important moment in the law, a “fundamental judgment determining how, where, and why the offender should be dealt with for what may be

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*Federal Judicial Role During the War on Drugs*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS (2000) (discussing application of federal Guidelines and mandatory minima on drug offenders, families, and corrections system); *United States v. Blarek*, 7 F. Supp. 2d 192 (E.D.N.Y. 1998) (granting downward departure to gay defendants on basis of vulnerability in prison and HIV-positive status; denying downward departure on basis of damage to professional career, duress, family circumstances, and reduced culpability); *United States v. Shonubi*, 962 F. Supp. 370 (E.D.N.Y. 1997) (criticizing unduly harsh sentences for drug couriers); *United States v. Malpeso*, 943 F. Supp. 254 (E.D.N.Y. 1996) (denying downward departure on basis of family circumstances and ordering restitution to Federal Bureau of Investigation); *United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996) (departing upward to increase fine, imposing costs of imprisonment, and ordering restitution in prosecution of wealthy landlord who burned an occupied building to collect on insurance policy); *United States v. Shonubi*, 895 F. Supp. 460 (E.D.N.Y. 1995) (considering bases and process of fact-finding and inference when, e.g., quantity of drugs carried determines appropriate sentence to be imposed); *United States v. Tropiano*, 898 F. Supp. 90 (E.D.N.Y. 1995) (criticizing the “atomistic fact-finding” required by appellate precedent and the federal Guidelines and departing upwards where benign nature of convicted offense belied actual extent of criminal enterprise and Guidelines under-represented true criminal history); *United States v. Guiro*, 887 F. Supp. 66 (E.D.N.Y. 1995) (imposing home confinement where suitable halfway house was not available near defendant’s family and place of employment); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT’G REP. 121 (1994) (describing elimination of intent from determination of sentence for drug offenders under the federal Guidelines); Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357 (1992) (defending existing fact-finding procedures at sentencing but criticizing bureaucratic mentality instilled by Guidelines practice); and Jack B. Weinstein, *A Trial Judge’s First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987) (expressing cautious optimism about the then-new federal Guidelines).

much or all of his remaining life.”<sup>813</sup> The problems for the judge are not too different from those of Lincoln in exercising his powers of pardon in courts martial cases.

A sentence is significant not only for the individual before the court, but for his family and friends, the victims of his crime, potential future victims, and society as a whole. For those charged with imposing sentences, the moral, legal, and psychological burdens are enormous. While much of the rules are statutory, the courts have at least as great a role as the legislature in sentencing policy and practice.<sup>814</sup>

Sentencing is the point where the heart of the law—and its human face—is most clearly revealed. In considering Lincoln’s views of the nature of our government, a probe into the criminal justice system—and particularly sentencing history and practice—is warranted: sentencing exposes how we, the judges, see the people before us, empathize with them and their social and economic situations, and exercise our responsibilities to them and to the people generally in controlling crime.

Two decades ago, Sentencing Guidelines developed by a federal Sentencing Commission under statutory mandate took effect and completely changed federal sentencing

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<sup>813</sup>MARVIN E. FRANKEL, *CRIMINAL SENTENCES* vii (1973) (a seminal book on modern United States sentencing). Highly effective in shifting emphasis towards a more fixed deserts-oriented system were analyses such as NORVALL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974) and ERNST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975). Early works calling for the analysis and intelligent use, rather than elimination, of judicial discretion include ROBERT O. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE* (Little, Brown: Boston, 1969) and Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for ‘Fixed’ and ‘Presumptive’ Sentencing*, 126 U. PA. L. REV. 550 (1978).

<sup>814</sup>*See generally* MICHAEL TONRY, *THINKING ABOUT CRIME* (2004) (noting cycles of punitive sentiment in American history and American political and institutional sensitivity to “moral panic” caused by unusual, startling crimes).

procedures. In the name of consistency, uniformity, and fairness,<sup>815</sup> the federal Guidelines stripped trial judges of much of their historical discretion in sentencing and mandated somewhat robotic application of rigid, highly complex rules. In 2005, the United States Supreme Court declared these guidelines unconstitutional if construed as mandatory rather than advisory.<sup>816</sup> When imposing sentence, federal judges are now directed to consider the Guidelines, but need not apply them to the exclusion of general statutory and case-law criteria.<sup>817</sup> Broad judicial

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<sup>815</sup>28 U.S.C. § 991(b)(1)(B).

<sup>816</sup>*United States v. Booker*, 543 U.S. 220 (2005) (declaring federal sentencing guidelines unconstitutional because the provisions permitting the judge to sentence based on allegations not found by a jury to have been proven beyond a reasonable doubt violated the Sixth Amendment guarantee of trial by jury); *see also* *Blakely v. Washington*, 542 U.S. 296 (2004) (declaring state sentencing guidelines with similar provisions unconstitutional).

<sup>817</sup>*Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”); *see also* 18 U.S.C. § 3553(a), setting general criteria for sentencing as follows:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines— . . .
- (5) any pertinent policy statement—
  - (A) issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with

discretion has thus been reinstated, with appellate review for reasonableness.<sup>818</sup>

Since the federal Guidelines took effect in 1987, an immense literature applying, defending, and criticizing them—and more successful, less rigid state versions—has blossomed.<sup>819</sup> Scholars, practitioners, and jurists have thoroughly debated the bases, goals, and effects of punishment.<sup>820</sup> We are a long way from the condition described by my distinguished classmate and colleague, Marvin Frankel, in 1973, who complained that “we have chosen, or permitted ourselves, to stop thinking about the criminal process after the drama of apprehension, trial, and conviction (or plea) has ended.”<sup>821</sup>

The American justice system has now run the gamut of sentencing procedures from nearly unlimited judicial discretion to rigid administrative agency dicta and back to somewhat

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- (7) similar records who have been found guilty of similar conduct; and  
the need to provide restitution to any victims of the offense.

The right of victims to be heard at sentencing is a relatively recent statutory change. *See* Pub. L. No. 108-405 § 102 (2004) (codified at 18 U.S.C. § 3771).

<sup>818</sup>*Booker*, 543 U.S. at 261 (the factors enumerated in 18 U.S.C. § 3553(a) “will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable”). There is disagreement among the appellate courts over whether a sentence that falls within the Guidelines is presumed to be reasonable. *See* *United States v. Fernandez*, 443 F.3d 19, 27-28 (2d Cir. 2006) (declining to establish such a presumption; collecting both consistent and contrary cases).

<sup>819</sup>Notable volumes on the topic include KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING* (1998); the FEDERAL SENTENCING REPORTER (founded in 1988 and published five times a year to address the federal Guidelines); and law review symposia such as Symposium, *Sentencing: What’s At Stake for the States?*, 105 COLUM. L. REV. 1276 ff. (2005), *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 STAN. L. REV. 1 ff. (2005), and *The State of Blakely in the States*, 18 FED. SENT’G REP. 1 ff. (2005).

<sup>820</sup>*See generally* the FEDERAL SENTENCING REPORTER.

<sup>821</sup>MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* ix (1973).

bounded discretion. The United States is far from having finally resolved the issues, and Congress and the courts may intervene with more controls at any time.

### History

The punitive response to crime that has become predominant in the last quarter of a century represents a sharp break from long-term trends in American punishment.

The United States system has never been monolithic. Practice has been diverse from the time when “America” was a scattering of disparate colonies founded on differing religious principles by different ethnicities, and remains so under the current system of fiercely independent states and a powerful parallel federal government.<sup>822</sup> Nonetheless, in the long view, certain tendencies are discernable.

Under colonial-era British practice, the problem of sentencing was relatively simple: most crimes were felonies, and resulted in death, torture, or transportation. Incarceration was not a common mode of punishment. Jails were used primarily to house those who were waiting to be tried or those who had been convicted and were awaiting imposition or execution of sentence.<sup>823</sup>

Almost from the establishment of the colonies, the trend was towards individualization and lessening of punishment. This “movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were

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<sup>822</sup>See *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 272-73 (E.D.N.Y. 2005), and sources cited therein (describing history of regional variation and role of federal Constitution in mediating difference among the states).

<sup>823</sup>See generally ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992).

reluctant to bring in verdicts which inevitably called for its infliction.”<sup>824</sup> Widespread in England and in the American colonies was a revulsion for a vicious criminal law that imposed death automatically for even the most minor felonies by young and old alike. In the seventeenth- and eighteenth-century colonies, as in England, “such routine crimes against property as theft and burglary” were punishable by death; yet “both judges and juries . . . demonstrated an extreme reluctance to execute” for minor crimes.<sup>825</sup> The colonists moderated capital punishment by statute, limited the death penalty to instances where Biblical sanction could be found; suspended sentences and issued pardons,<sup>826</sup> provided for benefit of clergy;<sup>827</sup> and committed acts of pious perjury.<sup>828</sup> The lash, stocks, pillory, branding, and expulsion—often suspended—replaced execution for many.<sup>829</sup> Fines and restitution, as well as public admonitions, were common.<sup>830</sup>

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<sup>824</sup> *Andres v. United States*, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring).

<sup>825</sup> ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 5-6 (1992).

<sup>826</sup> WILLIAM KUNTZ, *CRIMINAL SENTENCING IN THREE NINETEENTH-CENTURY CITIES* 32-33 (1988).

<sup>827</sup> “Benefit of clergy” was an English practice that permitted clergymen to escape capital punishment by being sentenced by the ecclesiastic courts, which did not have the death penalty, rather than the royal courts. In the colonies, where there were no ecclesiastic courts, the effect was to grant complete pardon from sentence.

<sup>828</sup> Judges and juries often acquitted those who were guilty rather than execute them for minor crimes, or convicted them of lesser charges when they were available.

<sup>829</sup> Suspended sentences are those imposed but not executed. They may be executed at any later time upon further mischief by the offender. ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 4 ff. (1992).

<sup>830</sup> Admonitions were delivered by judges and other respected citizens in full public view

By the late eighteenth century, the ideas of Italian nobleman Cesare Beccaria and advocacy of post-Revolutionary reformers such as Benjamin Rush and John Howard led to the development of incarceration as an alternative to capital punishment. Beccaria advocated increased use of imprisonment in the service of deterrence: moderate, certain punishments, he argued, were more effective than severe, erratically imposed ones.<sup>831</sup> Rush and other members of early United States humanitarian societies focused on the prospect of reformation: removal from a corrupting environment, they believed, could rehabilitate offenders to a lawful way of life.<sup>832</sup> These ideas took hold and spread rapidly. Massachusetts established the first prison exclusively for convicts and significantly revised its criminal law in 1785. The following year, New York and Pennsylvania followed suit. At the turn of the century, eight of the sixteen states had built prisons for convicts. By 1810, most states had amended their criminal codes to make incarceration the primary mode of punishment and to reserve capital punishment for the most serious crimes.<sup>833</sup> Judges in both the state and federal systems had broad discretion to determine the sentence in light of the circumstances of the offense and the offender.<sup>834</sup>

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in the hopes of awakening the offender's sense of propriety and reminding him of his duty to the community. *Id.*

<sup>831</sup>CESARE BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* (1764).

<sup>832</sup>*See, e.g.*, MARK COLVIN, *PRISONS, REFORMATORIES, AND CHAIN GANGS* 50-58 (1997).

<sup>833</sup>DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 55-62 (1971).

<sup>834</sup>*Mistretta v. United States*, 488 U.S. 361, 364 (1989) (“Congress early abandoned fixed-sentence rigidity . . . and put in place a system of ranges within which the sentencer could choose the precise punishment. Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected.”); WILLIAM KUNTZ, *CRIMINAL SENTENCING IN THREE NINETEENTH-CENTURY CITIES* 354 (1988) (judges in nineteenth-century state courts could select from a wide spectrum of

Prison administrators struggled to achieve rehabilitation within prison over the course of the nineteenth century. Attempts at imposing discipline on inmates by isolating them from their families, requiring silence, imposing corporal punishment, and marching them in lockstep did not prepare them for a lawful life on release. By mid-century, penologists were recommending short prison terms and preparations for inmates to reenter society in place of long terms of incarceration. Little change was achieved: the national political conflict, erupting in Civil War, was all-engrossing. During the mid-nineteenth century, penitentiaries were merely “holding operations.” Military prisons during the Civil War were dreadful killing grounds.<sup>835</sup>

In the late nineteenth and early twentieth centuries, the expanding field of social science studies and increased concern over the role of poverty in creating crime led to the development of a medical model of penology: the individualized care and “scientific” treatment of the offender.<sup>836</sup> Crime was seen as an environmental illness—a failure of the individual will, weakened by the ravages of poverty, to resist temptation. With the optimism typical of the period, Progressive Era criminologists and politicians believed that careful categorization and appropriate institutional programming would permit them to “cure” most offenders, and replace lengthy sentences in prison with extended supervision in the community for many.

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punishments subject to review only if they exceeded the statutory maximum).

<sup>835</sup>MACKINLAY KANTOR, *ANDERSONVILLE* (1955) (describing conditions at the Confederate prison camp in Andersonville, Georgia, where 13,000 of the 45,000 Union prisoners of war perished from malnutrition and disease).

<sup>836</sup>See Norman A. Carlson, *The Federal Prison System: Forty-five Years of Change*, *FED. PROBATION*, June 1975, at 37, 39 (“Correctional managers often speak in terms of diagnosis, of observation, of therapy, and of treatment. . . . [T]he terms employed are medical and mental health terms . . .”).

Several devices were utilized to reduce the severity of sentences for those who demonstrated actual or potential rehabilitation. Between 1860 and 1880, “gain time” or “good time” laws, under which inmates could expect to serve between one-half and one-third of their sentences if their behavior while incarcerated was satisfactory, were widely enacted. Parole, early release for those who had made demonstrable progress towards rehabilitation, was available in twenty states by 1900, and in almost all by 1922.<sup>837</sup> Probation, essentially a suspended sentence, was first instituted in Massachusetts in 1878, and spread widely after the turn of the century. Juvenile courts, based on the principle that minors were more susceptible to their environment and less capable of forming criminal intent, acted as a surrogate parent to delinquent, troublesome, or neglected youths. Instead of being incarcerated with adults, juvenile offenders were either returned home under probationary supervision or placed in youth homes. By 1925, a majority of the states had juvenile courts.<sup>838</sup>

The early history of these ameliorative devices was troubled. The refusal of legislatures to authorize sufficient funds, and the dearth of necessary administrative expertise, made these reform programs ineffective.<sup>839</sup> Particularly in the South, brutal chain gangs and leasing of

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<sup>837</sup>SANDRA SHANE-DUBOW, ET AL., *SENTENCING REFORM IN THE UNITED STATES* 4 (1985).

<sup>838</sup>THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY* 84-91 (2000).

<sup>839</sup>*See* DAVID J. ROTHMAN, *INCARCERATION AND ITS ALTERNATIVES* 15-17, 23-24 (1979); *see also* Norman A. Carlson, *The Federal Prison System: Forty-five Years of Change*, *FED. PROBATION*, June 1975, at 37, 38 (in 1930, “[f]ederal prison ‘guards’ earned \$1,680 per year, less meal allowances. They had to buy their own uniforms, including the ever-present night stick. There was no training—new employees were simply taken to their posts and left to their own devices.”).

prisoners as hired labor used prisoners as slaves of the State.<sup>840</sup>

Only piecemeal reforms to prison conditions were implemented—discipline remained arbitrary and often brutal; the schooling and vocational training offered were inadequate. Insufficient legal frameworks may have led to highly arbitrary decisions on release.<sup>841</sup> Fundamental tensions between custody (which requires wardens to focus on preventing escape and maintaining discipline) and rehabilitation (which necessitates the development of faculties of independent judgment and adjustment to freedom and responsibility) were resolved in favor of custody.

Over the course of the twentieth century, use of rehabilitative techniques expanded and their effectiveness somewhat improved. The federal prison system developed special education programs for youthful offenders; trained corrections officers as counselors; established a prison industries system; and opened pre-release guidance centers.<sup>842</sup> The Prisoner Rehabilitation Act of 1965 extended the guidance centers to adults and created furlough and work release.<sup>843</sup> By the late 1960s, youth centers began using sophisticated classification and treatment programs.

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<sup>840</sup>See DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1997). Abuses suffered by federal prisoners in connection with state convict leasing systems were one of the primary reasons for the establishment of the federal prison system. See generally PAUL W. KEVE, *PRISONS AND THE AMERICAN CONSCIENCE* (1991).

<sup>841</sup>The federal system in 1973 adopted detailed guidelines for its parole system that presaged the Sentencing Guidelines that were later adopted. See 18 U.S.C. § 4205(b) (1976) (repealed); Peter B. Hoffman, *History of the Federal Parole System: Part 2 (1973-1997)*, 61 *FED. PROBATION* 49, 49 (1997).

<sup>842</sup>See FEDERAL BUREAU OF PRISONS, *FACTORIES WITH FENCES: THE HISTORY OF FEDERAL PRISON INDUSTRIES* (1996).

<sup>843</sup>Prisoner Rehabilitation Act of 1965, Pub. L. No. 89-176, 79 Stat. 674 (1965).

In the late 1960s and early 1970s, diversion programs spread, increasing the number of offenders who served their sentences outside of prison or in less restrictive environments.<sup>844</sup> By the 1970s, de-institutionalization and community programming had become common, as part of an effort to avoid mixing minor and major criminals.<sup>845</sup> The federal Parole Board created detailed guidelines to determine appropriate release dates for inmates—based on, for example, the severity of the current offense, the offender’s criminal record, and the concerns of the community—that presaged the form of the Sentencing Guidelines, but better balanced rehabilitative, retributive, and other goals.<sup>846</sup>

Up to the last quarter of the twentieth century, rehabilitation (as opposed to just deserts, general and specific deterrence, or incapacitation) was understood to be the primary goal in sentencing. On this point both social reformers and day-to-day administrators (courts, wardens, district attorneys) were in agreement. Rehabilitation of prisoners—most of whom would

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<sup>844</sup>See Norman A. Carlson, *The Federal Prison System: Forty-five Years of Change*, FED. PROBATION, June 1975, at 37, 38 (describing the “correctional continuum [that] emerged, designed to give inmates an opportunity to improve their chances for postrelease success while making a gradual transition from a life of confinement to the freedom of society”).

<sup>845</sup>*Id.* (comparing conditions in 1930, when “[y]outhful first offenders often were placed in cell blocks which they shared with hardened offenders” and the mid-1970s use of “open institutions such as the new Federal Youth Center . . . where men and women can serve their sentences in a more normal, less corrosive atmosphere”).

<sup>846</sup>See 28 C.F.R. §§ 2.1 *et seq.* (1981) (repealed) (providing, as bases for determination of release date, the frequency and recency of the prisoner’s past crimes; age; any addictions; anything included in the presentence report regarding education, family life, upbringing, etc.; physical, mental, or psychological condition; reports by prison staff; opinions of the sentencing judge, attorneys, or other members of the community; behavior in prison; the nature and circumstances of the current offense; and the effect on respect for the law, appreciation for the seriousness of the offense committed, and public welfare if he or she were to be released before expiration of the imposed term).

ultimately be released into society—was believed to provide the most reliable protection for the public.

Over the past two centuries, the best way to accomplish rehabilitation has been vigorously debated: whether inmates should be kept entirely apart, or allowed to intermingle; whether determinate or indeterminate sentences should be imposed; whether prisoners should be subject to strict control, including physical abuse, or whether they should be treated as patients in need of counseling; whether forced labor was critical to rehabilitation, detrimental to rehabilitation, or in any event too great a threat to private enterprise to be tolerated; whether parole and pardon encouraged discipline or were destabilizing; whether the goal of rehabilitation was to instill a proper work ethic and discipline in the individual or whether a spiritual reformation was appropriate and possible; and whether medical, psychiatric models of treatment were more humane, or merely more invasive, and a violation of the basic civil right to be left alone.<sup>847</sup>

In my view, education and teaching of trades in prison, and close supervision for some years after prison with help in keeping a job and establishing sound family and community arrangements, is essential. It is expensive, but cheaper than long barren prison terms.

Rehabilitation has never been the only goal of the criminal justice system. Its efficacy has periodically been doubted.<sup>848</sup> Yet the belief in rehabilitation has endured. Not until the late

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<sup>847</sup>See, e.g., GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 25-42 (1998) (describing debate over whether motive for, or impact of, state coercion is critical for determination of needed procedural safeguards).

<sup>848</sup>See, e.g., Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1012-14 (1940).

1970s was the possibility of rehabilitation and its centrality to crime control rejected by many legislators and some criminologists.

By the end of the 1970s, the possibility of identifying those defendants amenable to rehabilitation and carrying out their reform had become strongly suspect.<sup>849</sup> One factor that led to this reaction was a high recidivism rate. Studies in the mid-1970s suggested the inability of prison to reform criminals. That many released prisoners returned to a continued criminal career reflected a growing consensus that prisons were schools for crime.<sup>850</sup>

It should be noted, however, that later studies reached a different conclusion—that some kinds of programs can be effective in reducing recidivism for certain types of offenders.<sup>851</sup> These studies addressed newer techniques consisting of alternative sentences that did not require incarceration, and supported the conclusion that incarceration itself promotes recidivism and retards rehabilitation.<sup>852</sup> Optimism about these community programs among career corrections officials contrasts starkly with the pessimism of conservative politicians.<sup>853</sup>

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<sup>849</sup>F.A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL—PENAL POLICY AND SOCIAL POLICY* (1981).

<sup>850</sup>*See, e.g.,* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 36 *PUB. INTEREST* 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism.”).

<sup>851</sup>*See, e.g.,* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *HOFSTRA L. REV.* 243 (1979); Michael Vitiello, *Reconsidering Rehabilitation*, 65 *TULANE L. REV.* 1011, 1037 (1991).

<sup>852</sup>The literature is immense. As an entry point, see Joan Petersilia, *What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*, *FED. PROBATION*, Sept. 2004, at 4, 8 (review of theory and research data suggests that “reentry programs that [take] place mostly in the community” are most effective in preventing recidivism and rehabilitating offenders).

<sup>853</sup>*See, e.g.,* Norman A. Carlson, *The Federal Prison System: Forty-five Years of*

Conservatism, and sentiments against the rehabilitative model, experienced a resurgence in the early 1980s, as part of a backlash against liberal attempts to expand the civil rights protections available to all citizens, including prisoners, in the period after World War II.<sup>854</sup> A perceived large crime wave and increasing fear of criminals, together with partisan appeals to these concerns, enhanced a revulsion towards any form of leniency.<sup>855</sup>

State and federal judiciaries and legislatures have both battered upon and reacted to such shifts in public opinion against the rehabilitative prison model.<sup>856</sup> The loss of faith by many in the ability of parole boards and judges to make sound decisions about the potential of individuals for reform has led to the replacement of highly discretionary indeterminate

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*Change*, FED. PROBATION, June 1975, at 37, 38 (according to the Director of the Federal Bureau of Prisons in 1975, “increased usage of community-based corrections holds great promise. Whenever consistent with the public interest, the criminal justice system should maximize the use of community-based programs such as probation, parole, halfway houses, and diversion methods for those offenders not dangerous to society[, such as] younger first offenders [and] alcoholics . . .”).

<sup>854</sup>Notable court cases and legislation included *Brown v. Board of Education*, 349 U.S. 294 (1955) (declaring unconstitutional segregation of public schools); *Mapp v. Ohio*, 367 U.S. 643 (1961) (prohibiting use of evidence obtained through unreasonable search and seizure in state courts); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (guaranteeing right of indigent criminal defendants (protecting right to be free from self-incrimination).

<sup>855</sup>*See generally* TED GEST, *CRIME AND POLITICS* 59 (2001) (chronicling rise of “get tough” rhetoric from 1964 presidential campaign and increasing role of federal government and partisan politics in crime control); MICHAEL TONRY, *THINKING ABOUT CRIME* (2004) (describing how cycles of punitive sentiment and political maneuvering coincided in late twentieth-century America).

<sup>856</sup>*See, e.g.*, *United States v. Bergman*, 416 F. Supp. 496, 498-99 (S.D.N.Y. 1976) (“[T]his court shares the growing understanding that no one should ever be sent to prison for rehabilitation.”); Sentencing Reform Act of 1984, Pub. L. No 98-473, 98 Stat.1987 (codified as amended in scattered sections of 18, 21 & 28 U.S.C.) (establishing Sentencing Guidelines); *see also* TAMASAK WICHARAYA, *SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME* 28-40 (1995).

sentencing and the possibility of early release with more rigid, determinate (and on average much harsher) sentences prescribed by the legislatures or administrative sentencing commissions.<sup>857</sup>

Though states were the first to experiment with harsher measures in response to the new criminal justice zeitgeist, they ultimately produced systems that were generally more reasonable than that developed by the federal government.

In response to the decline of the rehabilitative ideal, many states increased sentence severity while limiting judicial and administrative discretion to lessen the prescribed punishment in individual cases.

Beginning in the mid-1970s, states began experimenting with higher maximum sentences, more use of statutory minima, and extremely long sentences for repeat offenders. Extensive use of mandatory minima has created grave problems. Under them, a defendant convicted of a particular crime (usually a drug or firearms offense) faces a harsh sentence which the judge is powerless to lessen. These minima are often out of proportion to penalties set by otherwise controlling guidelines. They replace the bounded discretion of judges and parole boards with the unbounded discretion of the prosecutor to choose whether to charge a crime

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<sup>857</sup>By contrast, the Supreme Court espoused belief in the ability of experts to determine when a defendant was likely to provide a future threat to public safety, and so deserved the death penalty. *See Barefoot v. Estelle*, 463 U.S. 880, 896-905 (1983) (rejecting view of American Psychiatric Association that psychiatrists are unable to determine future dangerousness of a defendant); *see also, e.g.*, Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me With the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 20-43 (1999) (describing sources of expert error in predictions of future dangerousness); Thomas R. Litwak & Louis B. Schlesinger, *Dangerousness Risk Assessments: Research, Legal, and Clinical Considerations*, in HANDBOOK OF FORENSIC PSYCHOLOGY 171-217 (Allen K. Hess & Irving B. Weiner eds., 1999) (noting improvements over the past twenty-five years in predictions and enduring problems).

subject to a mandatory minimum.<sup>858</sup>

Similar in their harsh effect are habitual offender laws, which punish recidivating offenders with excessive penalties. Most infamous of these is California's "three strikes" law, which requires twenty-five-years-to-life sentences for those convicted of a third felony—even if the third felony is minor. In a recent case, the Supreme Court upheld two consecutive twenty-five-year-to-life sentences imposed on a man convicted of stealing a handful of videotapes from a thrift used-goods store.<sup>859</sup> Although much of the rhetoric supporting these policies has focused on violent crime, the greatest increases in sentence severity have fallen upon minor

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<sup>858</sup>Consider the case of Guillermo Santa. *See* *United States v. Santa*, No. 05-CR-649 (E.D.N.Y. May 11, 2006) (sentencing transcript). The defendant had mental disabilities, with a measured IQ of 58, within the bottom 0.3% of the adult American population. He had a long history of narcotics addiction. He was arrested and indicted for attempting to purchase several kilograms of cocaine—cocaine that did not exist, because he was dealing with an undercover agent. Though the defendant admittedly approached the agent to propose a cocaine deal, the agent aggressively "up-sold" the defendant (who is, it must be emphasized, mentally retarded) into attempting to purchase a significantly larger amount of drugs than he wanted and discouraged him from withdrawing from the deal. While the defendant had prior narcotics convictions, they were for \$15 and \$20 amounts, i.e., for personal use and occasional sale to feed his own addiction. He was working, engaged to be married, had an ill mother who depended upon him, and was rearing several children. In prison he would be vulnerable to manipulation and abuse. All of this would have prompted the court to impose a substantially reduced sentence.

The defendant's prior convictions permitted the prosecutor's office to choose whether to charge the defendant as a double prior felony drug offender subject to mandatory life imprisonment without parole; a single prior felony drug offender subject to a mandatory twenty year sentence without parole; a first-time offender subject to a mandatory ten-year minimum without parole, or even on a so-called "telephone" attempt-to-buy count that would have been a misdemeanor with a one-year maximum. The government chose to prosecute him as a first-time felony offender, and the defendant was sentenced to the ten-year mandatory minimum. Because of the legislative abrogation of judicial discretion, the defendant's sentence was chosen not by the court, but by the prosecution, and was in the court's opinion much harsher than it should have been.

<sup>859</sup>*Lockyer v. Andrade*, 538 U.S. 63 (2003).

property and drug offenders.<sup>860</sup>

The late twentieth century trend against rehabilitation has seen an inversion of one primary principle of reformers—separate treatment of youth. Whereas reform efforts traditionally focused on the young, i.e., those seen as most susceptible to rehabilitation,<sup>861</sup> in the past twenty years increasing numbers of laws have been passed treating juveniles as adults who are un-reformable. For example, in March 2000, California voters approved a law enabling prosecutors to try as adults children as young as fourteen.<sup>862</sup> California is only one of a large number of states to follow this path.<sup>863</sup> As a considerable body of public opinion swung against the idea of rehabilitation, the long-held practice of treating youthful offenders with greater leniency has decayed significantly. Youths now often receive sentences as harsh as—and in some cases, harsher than—those imposed on adults.<sup>864</sup>

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<sup>860</sup>See Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 241 (Michael Tonry & Richard S. Frase eds., 2001).

<sup>861</sup>See, e.g., George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1238 (1995) (reform in England focused on rehabilitation of young).

<sup>862</sup>Dan Morain & Tom Gorman, *Campaign 2000 Propositions*, L.A. TIMES, Mar. 8, 2000, at A1.

<sup>863</sup>William T. Stetzer, *The Worst of Both Worlds: How the Kansas Sentencing Guidelines Have Abandoned Juveniles in the Name of 'Justice'*, 35 WASHBURN L. J. 308, 313 n.31 (1996) (discussing “get tough” approaches to juveniles in Connecticut, Kansas, Missouri, and Texas); see also *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that death penalty for 16-year-olds is constitutional), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005) (ruling the death penalty unconstitutional for those under 18 at the time they committed their capital crimes, based in significant part on trend of American states and juries away from juvenile death penalty).

<sup>864</sup>AMNESTY INTERNAT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 33 (2005) (“[I]n eleven out of

While retaining “good time,”—i.e., a percentage of the sentence automatically reduced in the order of ten percent when a prisoner has no serious disciplinary actions against him—several states abolished parole in the 1970s.<sup>865</sup> State parole systems usually provide for an administrative discretionary reconsideration of the release date for the prisoner after a minimum period has been served in prison. Release is supervised for the remainder of the prison term with power to re-incarcerate should the prisoner violate the terms of his parole as by committing crimes or resorting to drugs.

State parole was sharply reduced in 1994—in a serious reversal of state independence theory—when the federal government set aside eight billion dollars for new state prisons in states that adopted “truth in sentencing” laws, which require offenders to serve a great percentage (usually eighty-five percent or more) of the sentences imposed. In response, more than thirty states had changed their laws by 1999.<sup>866</sup> Because these “truth in sentencing” laws—so-called “transparency” requirements—were not accompanied by any statutory reduction in authorized sentences, they resulted in a sudden, dramatic increase in length of time served for a

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the seventeen years between 1985 and 2001, youth convicted of murder were more likely to enter prison with a life without parole sentence than adult murder offenders.”); *see* Editorial, *The Right Model for Juvenile Justice*, N.Y. TIMES, Oct. 28, 2007, at 11 (brutality in prisons where juveniles are treated as adults; new techniques are being developed to help and supervise through small community-based centers as in Missouri).

<sup>865</sup> AMNESTY INTERNAT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 224 (2005).

<sup>866</sup> Michael Tonry, *Punishment Policies and Patterns in Western Countries*, in *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 15 (Michael Tonry & Richard S. Frase eds., 2001).

broad variety of offenses.<sup>867</sup>

Also established were permanent sentencing commissions charged with responsibility for setting sentencing policy by promulgating uniform standards, now commonly known as guidelines. More than twenty states now have such commissions.<sup>868</sup> Many of these systems predate the better-known federal Guidelines.

Though all state guidelines systems seek to restrain judicial discretion by providing a narrowing administrative overlay on top of broad criminal statutes, the forms they take vary considerably. Some employ a single biaxial grid representing nearly all felony offenses, distilled to two numerical “scores,” with one axis relating to the characteristics of the offense and the other to the characteristics of the offender.<sup>869</sup> Other states have created individual worksheets and sentencing ranges for general categories of crimes (e.g., drug offenses, crimes against property, and crimes against the person) and applied them only to the most common crimes.<sup>870</sup> Some guidelines are “presumptive,” with any deviations requiring written

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<sup>867</sup>*Id.*

<sup>868</sup>Sentencing commissions were strongly suggested by former federal judge Marvin Frankel; he believed they could bring organizing legal principles to bear upon the selection of appropriate punishment. Aside from guidelines, Judge Frankel advocated on-the-record explanations of sentencing decisions and appellate review, both of which I support. Unfortunately, his fine analysis was seized upon to justify Draconian sentences.

<sup>869</sup>*See, e.g.*, MINN. SENT’G GUIDELINES, IV (2003); PENN. CODE § 303.16; WASH. ADULT SENT’G GUIDELINES MANUAL, I-2 (2005).

<sup>870</sup>*See, e.g.*, ALA. SENT’G COMM’N, INITIAL VOLUNTARY SENTENCING STANDARDS & WORKSHEETS 38-41 (2006); WISC. GUIDELINES WORKSHEETS (2005), *available at* <http://wsc.wi.gov>.

explanation by the judge and reviewable on appeal;<sup>871</sup> others are merely voluntary, with no right of appeal in either the defendant or the prosecution.<sup>872</sup> Some guidelines demand “calculation” of a sentence using pre-weighted variables (e.g., if the defendant has two prior felony convictions, add twenty points to his offender score), while others encourage the sentencing judge to consider factors that may mitigate or aggravate the risk posed by the offender in the future and weigh them as the judge sees fit.

Some states accomplished similar goals by amending their criminal statutes directly. California, for one, provided three possible sentences for any given crime—e.g., burglary in the first degree is punishable by a fixed term of two, four, or six years imprisonment—rather than sentencing ranges.<sup>873</sup> These examples suggest the wide variety of methods of sharing legislative control and discretion with the judges.

While several commissions were initially directed by their legislatures to limit prison growth, they have, in general, fed almost explosive prison population increases by setting continually harsher penalties. Like the states, the federal government began in the 1970s to increase maximum sentences and make greater use of mandatory minima. Federal legislation providing for binding sentencing guidelines was first proposed by liberal Senator Edward Kennedy during this period, and was intended, in connection with substantial reductions in the

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<sup>871</sup>*See, e.g.*, MASS. GENERAL LAW 211E § 4 (providing, inter alia, for review by defendant or the government if guidelines are applied incorrectly or the sentencing judge’s decision to depart from the guidelines was an abuse of discretion).

<sup>872</sup>*See, e.g.*, DEL. SENT’G ACCOUNTABILITY COMM’N, BENCHBOOK 2005 17 (2005) (“[I]t should be noted that Delaware’s sentencing guidelines are voluntary, non-binding, and as such, in the absence of constitutional violations, are not generally subject to appeal”).

<sup>873</sup>CAL. PENAL CODE § 461.

maximum periods of imprisonment for most crimes, to lighten the burden on minority defendants. When Republicans won a majority in the Senate in 1980, the process was embraced and redirected by Congress.<sup>874</sup>

The Sentencing Commission established by the 1984 federal Sentencing Reform Act was a frontal assault on the idea of penal rehabilitation. The Senate Report to the 1984 Act described the previous system of indeterminate sentences and parole board release as “based largely on an outmoded rehabilitation model.”<sup>875</sup> In its place Congress established a system in which trial judges’ discretion in sentencing was greatly reduced.<sup>876</sup> Parole was abolished. Good time and the use of probationary sentences were sharply reduced. In seeking to truncate the rehabilitative model, Congress instructed that “[t]he [Sentencing] Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”<sup>877</sup> At the same time, it drastically curtailed the ability of judges to impose non-custodial sentences.

Federal Guidelines sentences are determined by a grid with two axes, one for criminal

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<sup>874</sup>See Kenneth Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

<sup>875</sup>S. REP. NO. 98-225, at 38 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3221.

<sup>876</sup>*Cf.* *Koon v. United States*, 518 U.S. 81, 97 (1996) (explaining that in promulgating the Guidelines Congress had “manifest[ed] an intent that district courts retain much of their traditional sentencing discretion”).

<sup>877</sup>28 U.S.C. § 994(k).

history and another for offense level. Each point of intersection on the grid is defined by a narrow sentence range, with the lower sentence no less than seventy-five percent of the higher sentence.<sup>878</sup> Criminal history is determined by the number, length, and time of previous sentences.<sup>879</sup> Offense level is determined by reference to a 600-page catalog of offenses, aggravating and mitigating factors (some generally applicable, others relevant only to specific offenses), application notes, references to statutory provisions, and policy statements.<sup>880</sup> From this byzantine volume a single number, representing the final offense level, results. To determine the Guidelines sentence, a judge finds where on the grid the criminal history score and offense level intersect, and then chooses a number within the range provided.

Besides the less tangible effects on judges, attorneys, and defendants of such spiritually numbing arithmetical exercises, the Guidelines had an immediate effect on sentence length. Before the Guidelines took effect, the average federal sentence was thirteen months; after, it was forty-three months. Whereas half of all defendants were sentenced to probation before the Guidelines, only fifteen percent received probation afterwards.

The Sentencing Commission eschewed analysis under any of the traditional sentencing criteria in creating the Guidelines. Utilized instead was a statistical compilation of prior sentences as a substitute for theoretical analysis and field studies. Reenacted were the same errors complained of by Judge Frankel that set off the sentencing reform movement: “Our

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<sup>878</sup>Typical sentencing ranges are 18-24 months, 84-105 months, 210-262 months, and 324-405 months.

<sup>879</sup>U.S. SENT’G GUIDELINES MANUAL § 4A1.1 (2007).

<sup>880</sup>U.S. SENT’G GUIDELINES MANUAL § 1B1.1 (2007) (describing the steps required to determine sentence).

Congress and state legislatures have failed even to study and resolve the most basic of the questions affecting criminal penalties, the questions of justification and purpose . . . these problems as to the purposes of criminal sanctions are, or should be, at the bedrock of any rational structure of criminal justice.”

In writing the Guidelines, the Commission “sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as its starting point data estimating pre-guidelines sentencing practice.”<sup>881</sup> It contended that this:

[E]mpirical approach . . . helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.<sup>882</sup>

This statistically based foundation has proven inadequate to administer individual criminal litigations except in “routine” cases upon which there may be a “consensus.”

Moreover, the Commission compounded its harshness in critical areas by using new high legislative minima as a basis for computation, rather than prior practice, thus enormously increasing some sentences, particularly for drug crimes. That sentences imposed in the twenty years since the Guidelines were established cluster at or below the bottom of the cells provided

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<sup>881</sup>U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (2007).

<sup>882</sup>*Id.*

by the Guidelines rather than somewhere in the middle strongly suggests that they substantially exceed what judges think are appropriate.<sup>883</sup>

Although the drafters of the federal Guidelines believed that public policy dictated that they deviate substantially upward from pre-Guidelines practices in some instances, for example in the creation of extraordinarily harsh penalties for drug offenses (particularly crack-cocaine), the degree of severity does not appear to be fully supported by public sentiment.<sup>884</sup> Recent research supports the view that present federal sentencing practices, leaning towards lengthy periods of incarceration, are perceived as unnecessarily harsh.<sup>885</sup> As the huge increase in costs to taxpayers of excessive sentences comes to be appreciated, it can be expected that a rational tax-paying public will be even less approving of an anti-crime program that largely ignores utilitarian ameliorative factors.

The Sentencing Commission claimed that “[t]he guidelines may prove acceptable . . . to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that the guidelines are, as the Act

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<sup>883</sup>Letter from John Gleeson, Judge, U.S. Dist. Court for the E. Dist. of New York, to the United States Sentencing Commissioners (May 17, 2006) (on file with author).

<sup>884</sup>*See, e.g.*, LINDA DRAZGA MAXFIELD ET AL., U.S. SENT’G COMM’N, JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES (RESEARCH BULLETIN) 3 (1997)) (69.2% of over 1700 people surveyed believed that persons convicted of trafficking crack cocaine should be sentenced below the Sentencing Guideline range).

<sup>885</sup>*See, e.g.*, Julian V. Roberts, *American Attitudes About Punishment: Myth and Reality*, in SENTENCING REFORM IN OVERCROWDED TIMES 250, 254 (Michael Tonry & Kathleen Hatlestad eds., 1997) (study “results suggest that increased use of alternatives to incarceration can proceed without fear of widespread public opposition . . .”); NAT’L CRIM. JUSTICE COMM’N, THE REAL WAR ON CRIME 60-61 (Steven R. Donziger ed., 1996) (“Most Americans prefer punishments outside of prison for many types of nonviolent offenders if they are available.”).

contemplates, but the first step in an evolutionary process.”<sup>886</sup> Based on its continuing observation of the courts’ actions, revisions to the Guidelines were expected to occur.<sup>887</sup> Since the inception of the Guidelines in 1987, however, little change or improvement has taken place. When the Commission and Congress have responded to the courts’ attempts to reduce the harm caused by the Guidelines, they have tried to close the door on downward departures.<sup>888</sup>

As indicated by Congress’s rejection of attempts by the judges—and modest proposals by the Commission—to reduce huge differences in Guideline penalties for selling crack as opposed to other forms of cocaine, current political views discourage or prohibit any moderation of the Guidelines.<sup>889</sup> There is a significant risk that Congress may respond to the 2005 *Booker* ameliorating decision with an even more rigid system. One proposal would create “topless guidelines,” with rigid minima, almost limitless discretion to increase a sentence to the statutory

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<sup>886</sup>U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (2007) (The Basic Approach (Policy Statement)).

<sup>887</sup>U.S. SENT’G GUIDELINES MANUAL § 1A1.2 (2007) (The Statutory Mission).

<sup>888</sup>*See, e.g.*, PROTECT Act, Pub. L. No. 108-21 § 401 (2003) (providing for de novo appellate review of district court downward departures, limiting ability of court to find new reasons for departure on remand, and directing Sentencing Commission to “ensure that the incidence of downward departures are substantially reduced”).

<sup>889</sup>*See, e.g.*, U.S. SENT’G COMM’N, FEDERAL SENTENCING POLICY 192 (1995) (suggesting that the current use of the 100 to 1 sentencing ratio for crack cocaine offenses as compared to powder cocaine crimes is unfair); Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334, 334-35 (1995) (rejecting the Sentencing Commission’s proposed changes for reduction of the sentencing disparity between crack and powder cocaine offenses); *see also* Rod Morgan & Chris Clarkson, *The Politics of Sentencing Reform*, in *THE POLITICS OF SENTENCING REFORM* 1, 3 (Chris Clarkson & Rod Morgan eds., 1995) (noting that “party political calculation[s]” shape sentencing policies); Anthony N. Doob, *The United States Sentencing Commission Guidelines*, in *THE POLITICS OF SENTENCING REFORM* 199, 211 (Sentencing Reform Act to be viewed in light of the “political context in which it was written”).

maximum, explicit rejection of most conceivable grounds for leniency, and de novo review of any downward departures.<sup>890</sup>

The states with sentencing guidelines have created systems that appear more reasonable than the current federal structure. “State guidelines . . . tend to reflect a better balance than the federal guidelines on such key sentencing issues as the relative weight to be given to offense versus offender variables; the amount of remaining judicial discretion; the degree of sanction severity” and other variables.<sup>891</sup> This appears to be, in part, a product of the less political nature of the state processes as compared to the federal drafting process. Guidelines developed in other nations appear to be more successful than the American federal system, as well.<sup>892</sup>

Guidelines have not been, and will not be abandoned in the United States. Recent

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<sup>890</sup>See H.R. 1528, 109th Cong. § 12 (2005).

<sup>891</sup>See, e.g., ARK. CODE ANN. § 16-90-804 (judges may deviate from sentencing grid within a certain range without written justification); MINN. STAT. § 244.09 (“[S]entencing guidelines are advisory to the district court”); WASH. REV. CODE § 9.94A.010 (guidelines system “structures, but does not eliminate, discretionary decisions affecting sentences”). See generally 6 FED. SENT’G REP. 123-68 (1993) (collection of articles relating to state sentencing guidelines); David Boerner, *The Role of the Legislature in Guidelines Sentencing in “The Other Washington,”* 28 WAKE FOREST L. REV. 381 (1993) (discussing Washington State’s sentencing guidelines); Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773 (1992) (comparing the Federal Sentencing Guidelines to those of the state of Minnesota, which have been particularly successful in permitting some discretion while adequately controlling the number of prisoners so that prisons are not overcrowded).

<sup>892</sup>See, e.g., Andrew von Hirsch, *Sentencing Reform in Sweden*, in SENTENCING REFORM IN OVERCROWDED TIMES 211, 213 (claiming that Swedish “[s]entencers seem to be engaging more frequently in the kind of explicit reasoning the statute is designed to promote—that is, discussion of such issues as how great the offense’s penal value is, what mitigating or aggravating factors (if any) are present, [and] whether the prior criminal record is sufficient to adjust the penalty . . .”). See generally 7 FED. SENT’G REP. 270-311 (1995) (compilation of articles relating to sentencing in European countries).

decisions by the Supreme Court<sup>893</sup> appear to have strengthened the resolve of state and federal officials to preserve their sentencing structures, amending them as necessary to survive constitutional scrutiny.<sup>894</sup> The present process of revision of the Model Penal Code by the highly respected American Law Institute, a non-governmental organization of judges, lawyers, and academics, suggests relying heavily on them to assist judges in exercising discretion.<sup>895</sup> Our

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<sup>893</sup>See, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (declaring federal sentencing guidelines unconstitutional because the provisions permitting the judge to sentence based on allegations not found by a jury to have been proven beyond a reasonable doubt violated the Sixth Amendment guarantee of trial by jury); *Blakely v. Washington*, 542 U.S. 296 (2004) (declaring unconstitutional state sentencing guidelines with provisions similar to those in *Booker*).

<sup>894</sup>Don Stemen & Daniel F. Wilhelm, *Supreme Court Decision Focuses State Attention on Sentencing Regimes*, STATE NEWS (Vera Inst. of Justice, New York, N.Y.), June-July 2005, at 20, available at [www.vera.org/publication\\_pdf/307\\_574.pdf](http://www.vera.org/publication_pdf/307_574.pdf) (cataloging state responses to *Blakely v. Washington*, 542 U.S. 296 (2004)).

<sup>895</sup>The central provision of the April 17, 2006 discussion draft of the ALI's *Model Penal Code: Sentencing* is the establishment of a sentencing commission for the promulgation of sentencing guidelines. It also contains the following declarations of purpose, which reflect the practice of using guidelines as advisory benchmarks:

- § 1.02(2) The general purposes of the provisions on sentencing are:
- (a) in decisions affecting the sentencing of individual offenders:
    - (I) to render sentences within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
    - (ii) in appropriate cases, to achieve offender rehabilitation, general deterrence, incapacitation, and restoration of crime victims and communities, provided these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(I); and
    - (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(I) and (a)(ii);
  - (b) in matters affecting the administration of the sentencing system:
    - (I) to preserve judicial discretion to individualize sentences within a framework of recommended penalties;
    - (ii) to encourage sentences that are uniform in their reasoned pursuit of the purposes in subsection (a);

recent history demonstrates the great threat to human and civil rights posed by such systems when they are crafted without concern for practical consequences or the fates of offenders, their families or their communities.

#### Effect of Reforms on Mass Imprisonment

The combination of mandatory minimum penalties, rigid guidelines, elimination of parole, and reduced use of probation or other intermediate sanctions has resulted in the United States punishing offenders much more severely than any other Western nation and more harshly than at any time in its own history of the last 150 years, at great cost to offenders, families, the

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- (iii) to eliminate inequities in sentencing across population groups;
  - (iv) to encourage the use of intermediate sanctions;
  - (v) to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources;
  - (vi) to ensure that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental-health care, and opportunities to rehabilitate themselves;
  - (vii) to promote research on sentencing policy and practices, including assessments of the effectiveness of criminal sanctions as measured against their purposes, and the effects of criminal sanctions upon families and communities; and
  - (viii) to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities.

MODEL PENAL CODE: SENTENCING § 1.02(2) (Discussion Draft No. 2, 2006).

At a recent ALI meeting where this proposal was discussed, I opined that provisions (a)(I) and (a)(ii) placed too much emphasis on just deserts, which has been used by some legislators to require inappropriately long sentences or the death penalty. I suggested that the words “in appropriate cases” be inserted at the beginning of (a)(I), and that the phrase beginning with “provided” in (a)(ii) be stricken. This would accord with section 3553(a) of title 18 of the United States Code, which does not give priority to any one rationale. I also suggested that there be added a new subsection after (b)(v), to read: “to ensure that adequate resources are available to assist with reentry into and supervision in society.”

corrections system, and taxpayers.<sup>896</sup>

Although the rhetoric used to support these programs has often made reference to public safety and violent crime, most of the expansion of the prison system has been at the expense of non-violent minor property and drug offenders and technical parole and probation violators.<sup>897</sup> The burden of this project in mass incarceration has fallen primarily on minority communities and has aggravated existing patterns of poverty and racial segregation.<sup>898</sup>

Differences in the way statistics are kept make comparisons imperfect: it is evident that terms of incarceration in the United States are significantly longer than anywhere else in the Western world.<sup>899</sup> This situation is manifest in the nation's high rates of incarceration, because longer prison terms reduce the number of prisoners being released while the rate of new prisoners entering the system remains the same or increases. At the extremes, compare the rate

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<sup>896</sup>See, e.g., Laurie P. Cohen, *A Law's Fallout: Women in Prison Fight for Custody*, WALL ST. J., Feb. 27, 2006, at 1 (describing impact of widespread, lengthy imprisonment for minor drug offenses and 1997 Adoption and Safe Families Act requiring states to terminate parental rights for those whose children have been in foster care for 15 of the previous 22 months); Jack B. Weinstein & Mae C. Quinn, *Some Reflections on the Federal Judicial Role During the War on Drugs*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS (2000) (discussing effect of federal Guidelines and mandatory minima on drug offenders, families, and corrections system).

<sup>897</sup>MICHAEL JACOBSON, *DOWNSIZING PRISONS* 131 ff., 145 (2005) (high percentage of prison admissions due to technical parole violations in federal system and all states).

<sup>898</sup>See generally Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AMER. SOC. REV. 151 (2004); *POVERTY TRAPS* (Samuel Bowels et al., eds., 2006).

<sup>899</sup>See generally BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CROSS-NATIONAL STUDIES IN CRIME AND JUSTICE* (David P. Farrington et al. eds., 2004); Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1, 6, 31 (2005).

of incarceration in the United States on June 30, 1997—645 per 100,000 citizens—with that in Norway on September 1, 1997—55 per 100,000 citizens. In 2005, the United States incarceration rate rose to 738 per 100,000 citizens, or over two million.<sup>900</sup> If those awaiting trial or sentencing in jails, and those on parole, probation, or supervised release are added, the number of those under the control of criminal institutions rises to some seven million—well over two percent of the population.<sup>901</sup>

An offender convicted in the United States is more likely to receive a sentence of incarceration, and that sentence is likely to be much longer than that imposed in other Western countries. For example, the average time served for burglary in the United States in 1995-1996 was thirty-five months; in the Netherlands, it was 11.4 months; in Australia, it was 20.2 months; and in England and Wales, it was seven months. For assault, average time served was 40.4 months (United States), five months (Netherlands), twenty-seven months (Australia), and 6.1 months (England). The greater prevalence of guns in the United States can explain some of the longer sentence lengths for violent crimes—because guns increase the seriousness of harm caused by violent offenses—but not differences in overall sentence length. Most of the prison growth in the last thirty years in the United States has been driven by drug and other non-violent

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<sup>900</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005 2 (May 2006).

<sup>901</sup>Based on July 2004 estimates of 293.7 million persons in the United States and 6.99 million individuals under correctional control. Population Div., U.S. Census Bureau, Annual Estimate of the Population of the United States, Regions, and Divisions: April 1, 2000, to July 1, 2004 tbl.8 (2004), *available at* <http://www.census.gov><http://www.census.gov/popest/states/tables/NST-EST2004-08.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.6.1.2005, *available at* <http://www.albany.edu/sourcebook/pdf/t612005.pdf>.

offenders, especially the increased imprisonment of offenders on supervised release, probation, or parole who violate conditions of supervision.

Differences in sentence lengths also cannot be explained by variations in crime trends. A survey of the crime rates of Australia, England and Wales, Canada, the Netherlands, Scotland, Sweden, Switzerland, and the United States, through both victim surveys and police reports, shows that cross-national trends in crime rates are generally similar. While all nations saw a general increase in crime from the 1960s to the late 1980s, only the United States reacted by sharply increasing the use of imprisonment, and only the United States continued to increase its use of imprisonment as crime levels dropped in all Western nations beginning in the early 1990s.

Crime level differences cannot explain punishment inequalities. For example, victimization rates for burglary in England and Wales exceed that for the United States, and rates in the Netherlands match those of the United States. Overall victimization rates in the United States are lower than those in Canada, France, Switzerland, the Netherlands, Scotland, and England and Wales, and almost identical to those in Sweden—all of which punish much less severely than the United States.

The United States now incarcerates a much greater percentage of its population than it has at any time in its history. Throughout much of the twentieth century, incarceration rates tracked crime rates.<sup>902</sup> Since 1980, however, incarceration rates have jumped while crime rates have leveled off and dropped.

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<sup>902</sup>*See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES: 1850-1984 (1986).

The overall American crime rate grew rapidly between 1960 and 1980, dropped sharply until 1984, and then climbed steadily until its peak in 1991. Since then, it has declined steadily and leveled off at 1970 rates.<sup>903</sup> By contrast, the American incarceration rate decreased slightly between 1960 and 1973, when it began to climb slowly until 1980. From 1980 until 1996, imprisonment grew precipitously, after which point it continued to grow steadily through 2001, the last date for which reliable numbers are available.<sup>904</sup>

When these data points are compared, two things stand out. First, increases in rates of incarceration trailed increases in the crime rate by fifteen to twenty years. The crime rate rose from 1960 on, but the incarceration rate did not climb until the mid-to-late 1970s. Thus, increasing crime rates did not cause increasing incarceration. Second, decreases in the crime rate since 1991 have not resulted in decreasing incarceration rates. The crime rate fell quickly after 1991 and leveled off in the early twenty-first century, but the rate of incarceration continued to rise appreciably increasing with only slightly less vigor from the mid-1990s. Thus, decreasing crime rates have not resulted in decreasing incarceration. These statistics suggest, and further analysis supports, the conclusion that mass imprisonment is not the result of increasing crime, and decreasing crime is not the result of mass imprisonment. Rather, the historically high rate of incarceration is a direct result of punitive policies enacted in the past

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<sup>903</sup>See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.29.2005, *available at* <http://www.albany.edu/sourcebook/pdf/t6292005.pdf>.

<sup>904</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.3.106.2003, *available at* [www.albany.edu/sourcebook/pdf/t31062003.pdf](http://www.albany.edu/sourcebook/pdf/t31062003.pdf) (estimated number and rate of offenses known to police).

twenty years without regard to their effectiveness. Higher rates of incarceration have had some effect on incapacitation, but not much, since the prisoners ultimately return to society (though usually at ages where energy to commit crimes is reduced), and general deterrence remains an enigma, often assumed without basis in fact.

The basis for many of these late twentieth century policies has been a particularly unrealistic concept of incremental deterrence: if penalties are increased, potential offenders will recalculate the costs and benefits of committing a given crime, and crime will decrease. Whatever theoretical appeal this approach may have, and whatever its potential effectiveness in financial crimes,<sup>905</sup> it is largely inapplicable to the drug, gun, sex, and petty violence crimes that are the rhetorical basis for broad increases in punishment; those crimes are not, like many financial crimes, committed by those who calculate potential punishment before they act and are thus fit subjects for deterrence by example. Rather, in our experience, they are generally committed by street-criminals who are ill-educated and without substantial resources, acting with little thought of consequences.

Empirical research into the deterrent effects of increased sentences has been inconclusive.<sup>906</sup> Increases in arrests and convictions<sup>907</sup> and decreases in unemployment<sup>908</sup>

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<sup>905</sup> Cf. Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569 (2006) (noting the difficulty of deterring even tax evasion, which is susceptible to rational economic calculation, and proposing a complex sanctions scheme).

<sup>906</sup> ANDREW VON HIRSCH, ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY 45-48 (1999) (thoroughly reviewing the empirical literature and concluding that, while increased certainty of punishment correlates with decreased crime rates, there is “scant support” that “seldom achieve[s] statistical significance” for the proposition that increased severity of punishment leads to a decrease in crime rates).

correlate more strongly with decreased crime rates than do increased sentences.

In response to the high costs and dubious benefits of mass incarceration, some states have attempted to keep the number of prisoners within acceptable bounds through adjustments to their sentencing guidelines. There is little cause for optimism about this approach. It is difficult to keep the size of the “funnel” into prisons at an appropriate width by altering sentencing practices because of the pressure on legislators, sentencing commissioners—and judges, as well—to respond as a matter of public relations to particularly shocking cases, or what are believed to be dangerous trends, by increasing the number of those imprisoned and the lengths of imprisonment.<sup>909</sup> A more practical way to reduce the numbers in prison is through some authority which can release in individual cases, or by groups or categories, when the numbers become too large. Depending upon the pardoning authority of the executive is futile since the executive will respond to the same public relations pressures as do those filling the

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<sup>907</sup>Patrick A. Langan, *United States*, in U.S. DEP’T OF JUSTICE, CROSS-NATIONAL STUDIES IN CRIME AND JUSTICE 66 (David P. Farrington et al., eds., 2004).

<sup>908</sup>*Id.* at 67-68; Brandon C. Welsh & Mark J. Irving, *Canada*, in U.S. DEPARTMENT OF JUSTICE, CROSS-NATIONAL STUDIES IN CRIME AND JUSTICE 148 (David P. Farrington et al. eds., 2004). There also appears to be some correlation between use of family planning and decrease in crime rates, though the data are hotly disputed. See John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, QUARTERLY J. OF ECON. 379-420 (May 2001). But see Christopher L. Foote & Christopher F. Goetz, *Testing Economic Hypotheses with State-Level Data: A Comment on Donohue and Levitt (2001)* (Fed. Reserve Bank of Boston, Working Paper No. 05-15, 2005), available at <http://www.bos.frb.org/economic/wp/wp2005/wp0515.pdf>.

<sup>909</sup>See, e.g., U.S. SENT’G GUIDELINES MANUAL § 2D1.1; U.S. SENT’G GUIDELINES MANUAL app. C, amend. 681 (2005), at 150 (2007) (increasing the penalties for use of anabolic steroids pursuant to a congressional directive responding to widespread attention to abuse of performance enhancing drugs by professional and amateur athletes).

prisons.<sup>910</sup>

Before the Sentencing Guidelines were adopted in the federal system, the Federal Parole Board exercised wide discretion and was central to the federal sentencing system. It could restrict prison population with some efficiency. It could provide for early release under a “(b)” sentence imposed by the court,<sup>911</sup> and it had very substantial internal guidelines for cutting down excessive sentences. Much of the commentary complaining of pre-Guideline inconsistency of federal sentences failed to take account of these federal parole practices, which had a substantial impact in leveling off what appeared to be disparate punishments imposed by the judges; there was a wide difference between the sentence imposed the judge and the much shorter sentence served. This was a continuing source of discontent to the more conservative elements of the community since it made the system more opaque and less punitive.

This kind of “back room” approach to reducing disparity and excessively long

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<sup>910</sup>See Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, LITIG., Winter 2006, at 25, 29 (beginning in the early 1980s, “the politics of crime increased the perceived risks of pardoning in America. . . . Although politicians always had known that pardoning was unlikely to win many votes, they now appreciated that pardoning could ruin a political career.”).

<sup>911</sup>See 18 U.S.C. § 4205(b) (1976) (repealed) (“Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.”). The court itself had 120 days after the sentence to reconsider and reduce it. Fed. R. Crim. P. 35(b) (1944) (amended 1987). Now the sentence can be changed only on motion of the United States Attorney, who makes it if the prisoner decides to cooperate. Fed. R. Crim. P. 35(b).

sentences—which government cannot afford and which are extremely destructive to prisoners, their families, and society—runs counter to the current emphasis on “transparency” in sentencing. In point of fact, however, much of the demand for a severe sentence comes at the time of conviction and sentencing, and cools considerably after the prisoner has served some, if not all, of the designated incarceration period.<sup>912</sup> There will, of course, be a few cases where a prisoner who is released early will commit another notorious crime, and this will prompt an outcry about excessive leniency. Yet such high-profile crimes are relatively rare and intermittent public criticism is a low price to pay for a realistic and affordable system.

#### Economic and Political Consequences of Discriminatory Justice

The punitive sentiments that support overly harsh penalties also blind us to the economic and political consequences of those penalties. A strong correlation has been found between “high per capita imprisonment rates and public support for imprisonment as the best sentencing option,”<sup>913</sup> which in turn correlates with a high tolerance for inequality. Societies that lack a fully-developed social welfare system tend to impose much higher sentences of incarceration on convicted individuals and tend to have a greater proportion of their population in prison at any given time.<sup>914</sup> The greater positive rewards available in such societies—i.e., fewer limits on the accumulation of wealth and power—are paired with more severe “negative rewards” for “those

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<sup>912</sup>*See, e.g.,* United States v. Blake, 89 F. Supp. 2d 328, 334-35, 336 (E.D.N.Y. 2000) (victim stabbed during attempted bank robbery initially requested that defendant receive maximum sentence; after six months, and an opportunity to learn about the defendant’s mental health history, she decided that she was content to leave the sentence to the court’s discretion).

<sup>913</sup>Warren Young & Mark Brown, *Cross-National Comparisons of Imprisonment*, 17 CRIME & JUST. 1, 41 (1993) and sources cited therein.

<sup>914</sup>*Id.* at 41-42.

who fail by breaking society's rules."<sup>915</sup> The United States, for example, has both the problem of mass incarceration and a gap between the rich and the poor that is larger than that found in other Western industrialized nations and that continues to grow.<sup>916</sup> These two phenomena have not only a correlational, but a causal relationship.

Incarceration removes the prisoner from the life cycle that moves a person through youth into responsible adulthood.<sup>917</sup> A prison record often prevents an individual from finding work; results in lower wages post-incarceration; separates husbands, wives, and children; and "can be as repellant to prospective marriage partners as it is to employers."<sup>918</sup> "In short, going to prison is a turning point in which young crime-involved men acquire a new status involving diminished life chances and an attenuated form of citizenship."<sup>919</sup> The prisoner, isolated from society by his prison sentence and divested of resources that permit him to lead a productive life, is more likely to return to criminal activities to support himself. Thus, extensive "incarceration

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<sup>915</sup>*Id.*

<sup>916</sup>*See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2005, 270 tbl.15 (2005) (income inequality in the United States exceeds that in almost all "highly developed" nations, including all of Western Europe, Israel, Greece, South Korea, Poland, Estonia, and Trinidad and Tobago); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, QUART. J. ECON., Feb. 2003, at 1, 1-39 (income inequality in the United States decreased sharply after World War II, remained at historically low levels until the late 1970s, increased steadily and quickly thereafter, and continues to increase).

<sup>917</sup>BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 6-7 (2006).

<sup>918</sup>*Id.* at 7-8. *See generally* Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AMER. SOC. REV. 526 (2002).

<sup>919</sup>Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AMER. SOC. REV. 151, 155 (2004).

may be a self-defeating strategy for crime-control”<sup>920</sup> and contributes to poverty.

In the United States, the burdens of imprisonment fall disproportionately on the African-American community. African-American (hereinafter “Black”) men are at a much higher risk of incarceration than the rest of society. Black men ages twenty-two to thirty who have dropped out of high school are more than twice as likely (72%) to be unemployed than are similarly situated White (34%) and Hispanic (19%) men.<sup>921</sup> More Black men in their late twenties who have dropped out of high school are in prison (34%) than work (30%). Thirty percent of Black men whose education stopped after high school graduation have served time in prison by their mid-thirties, as have 60% of Black male high school dropouts. At the end of 2004, for every 100,000 Black men in the United States, 3,218 were sentenced prison inmates.<sup>922</sup> In comparison, the corresponding number for Hispanic men was 1,228, and for White men, 463. Approximately 8.4% of Black men between the ages of twenty-five and twenty-nine were in state or federal prison on December 31, 2004, compared with 2.9% of Hispanic men and 1.2 % of White men. Most tellingly, Black men born between 1965 and 1969 are more likely to serve time in prison (22.4%) than to serve in the military (17.4%) or to obtain a bachelor’s degree (12.5%).<sup>923</sup>

This disproportionate impact reproduces itself. “Neighborhood poverty [is] both a

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<sup>920</sup>*Id.*

<sup>921</sup>Erik Eckholm, *Plight Deepens for Black Men, Studies Warn*, N.Y. TIMES, Mar. 20, 2006, at A1.

<sup>922</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2004 8 (2005).

<sup>923</sup>*Id.*

persistent and increasingly prevalent condition.”<sup>924</sup> In a study of Chicago neighborhoods from 1970 to 1990, though there was an increase in the amount of overall poverty, the neighborhoods’ relative poverty remained stable over time. As poor neighborhoods stay poor, they also become increasingly segregated. Any neighborhood that was 40% Black in 1970 was, by 1990, at least 75% Black, while other parts of the city contained Black populations well below 20%.<sup>925</sup> In summary, a neighborhood that begins poor and Black becomes increasingly poor and segregated over time. The weight of the criminal justice system thus falls more and more on the potential leaders of the same communities, rendering their citizens less likely to re-integrate, and removing key male leadership resources.

In practical terms, segregation reduces access to jobs, education, and housing. In broader terms, it estranges portions of our communities from one another, heightening perceptions of difference and making it easier for an empowered group to ignore the needs of the disempowered. Criminality has long been blamed on “outsiders.” The perceived rise in property crimes in the early nineteenth century was, at the time, attributed to “vagabonds,” strangers who had no connection to the communities they victimized. This sense of threat from without has deepened. Many fail to recognize “in-community” poor and minorities now; rather, they exist for some as a class unto themselves, monolithic and opposed to social order.<sup>926</sup> The

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<sup>924</sup>Robert J. Sampson & Jeffrey D. Morenoff, *Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods*, in *POVERTY TRAPS* 176, 179 (Bowels et al. eds., 2006).

<sup>925</sup>*Id.* at 183-84.

<sup>926</sup>*Cf.* MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976 61-62 (2003) (describing the process by which Western societies come to define themselves by reference to State norms and institutions and how those in the

urge to punish is thus unmet by the restraint caused by recognizing the offender as another member of the community.

Systematic discrimination also results in a serious political problem—the disenfranchisement of large numbers of minorities.<sup>927</sup> As I noted above when discussing voting, convicted felons are by state statute denied the vote while incarcerated, and in many cases afterwards.<sup>928</sup> At the same time, in states like New York, the residence of the incarcerated person is shifted to the place of the prison for purposes of computing the number of representatives that region is entitled to in the state legislature.<sup>929</sup> The political impact is devastating. The defendant is denied whatever rehabilitative advantage there is in sensing that he is a member of a democratic society with a right to be heard with the dignity of a voter, and it denies political clout to a large number of male African Americans. It increases substantially

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population who deviate from those norms come to be seen as “outsiders” and non-citizens).

<sup>927</sup>*Cf.*, e.g., *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc) (holding that the federal Voting Rights Act does not apply to New York State’s felon disenfranchisement law).

<sup>928</sup>*See*, e.g., N.Y. ELECTION LAW § 5-106(2) (“No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.”). In some states, disenfranchisement endures even after the full sentence is served. *See*, e.g., FLA. CONST. art. VI, § 4 (1968) (“No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”).

<sup>929</sup>*See* Sam Roberts, *Court Asks if Residency Follows Inmates Up River*, N.Y. TIMES, May 13, 2006, at B1; Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES, May 20, 2006, at A12 (“Prison-based gerrymandering has helped Republicans in the northern part of New York maintain a perennial majority in the State Senate and exercise an outsized influence in state affairs.”); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc) (remanding to district court to consider claim that apportionment system violates the Voting Rights Act by diluting votes of those in districts with high numbers of felons serving time in other parts of the state).

the number of residents attributable to the rural communities where prisons are located,<sup>930</sup> and which are generally more conservative. These communities favor more prisons and more prisoners—because incarceration is a major industry supplying reliable jobs. At the same time, it decreases the representation of minority communities in major cities. Putting the prisons far from the metropolitan centers—in New York, upstate—also contributes to the destruction of the inmate’s salutary relationships. Family members and children have to travel a great distance to visit, and they often cannot afford to do so, breaking essential family ties.

This situation seems hard to justify in a democratic republic based upon the precept that all persons are created equal. The closest analogy in our history is the three-fifths provision of Article I, Section 2 of the original Constitution, which greatly increased the relative power of the Southern slaveholding states up until the Civil War by counting slaves as three-fifths of a person for representational purposes while denying them the right to vote.<sup>931</sup>

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<sup>930</sup>Roughly 44,000 New York City residents are imprisoned in upstate New York. “The average population of [New York State] Senate districts is about 306,000. In one rural district . . . not counting the nearly 13,000 or so prisoners as residents would reduce the population to about 286,000, compared with more than 320,000 in some [New York City] districts.” In another rural district, “seven percent of the reported census population is actually prisoners from other parts of the state.” Sam Roberts, *Court Asks if Residency Follows Inmates Up River*, N.Y. TIMES, May 13, 2006, at B1 (quoting executive director of prominent advocacy group).

<sup>931</sup>U.S. CONST. art. I § 2 cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”). For example, in 1850, Virginia had 894,800 White residents, 54,333 free Black residents, and 472,528 slaves. Its population was calculated as  $3/5*(472,528) + 894,800 + 54,333 = 1,232,650$ . (“Free” Black residents were unable to vote.) This gave it more representatives than Indiana and Massachusetts, even though both of those abolitionist states had larger voting populations. Even more dramatically, South Carolina’s 274,563 White residents and 8,960 free Black residents were augmented for federal representation purposes by 384,984 slaves (230,990 after the three-fifths adjustment), nearly doubling its representation in

There are some signs that the recent punitive tide may be ebbing. Recently, more specialized courts have been established to treat rather than incarcerate drug-dependent persons whose crimes were drug-related, or to address issues underlying domestic abuse without fracturing families unnecessarily.<sup>932</sup> Administrative agency tribunals for motor vehicle, labor, and environmental violations have both been used to decriminalize offenses and to address special administrative problems.<sup>933</sup>

Under the immense fiscal pressure of huge prison systems, individual states are reconsidering their statutes to permit non-incarceratory sentences; to increase the use of parole and good time; and to back away from the harshest mandatory minimum laws. The drug court movement has diverted many thousands of addicted offenders from prison to court-supervised mandatory social services programs.<sup>934</sup>

As already pointed out, the Supreme Court, in its 2005 *Booker* decision, rendered the

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Congress. 1850 UNITED STATES CENSUS,  
[fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=850](http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=850).

<sup>932</sup>In 2001, New York City began funding the “Keeping Families Together Initiative” conducted by Legal Services of New York. The program provides parents with representation in family court and assists them in getting the social services needed to allow them to maintain custody of their children. See [www.lsnyc.org](http://www.lsnyc.org).

<sup>933</sup>See, e.g., Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (2001).

<sup>934</sup>BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, DRUG COURT MONITORING, EVALUATION, AND MANAGEMENT INFORMATION SYSTEMS: NATIONAL SCOPE NEEDS ASSESSMENT 2 (2003) (during the 1990s, “close to 230,000 defendants [] participated in more than 500 drug court programs nationwide”). According to the Department of Justice, “[a]s of April 2007, there were 1,699 drug courts operating in the United States, and 349 more were in the planning phases.” Office of National Drug Control Policy website, [www.whitehousedrugpolicy.gov/enforce/drugcourt.html](http://www.whitehousedrugpolicy.gov/enforce/drugcourt.html) (last visited on Nov. 16, 2007).

federal Sentencing Guidelines advisory, as at least some in Congress originally designed them to be. There is now room to loosen the tight grip the Sentencing Commission had exercised over sentencing, permitting courts discretion to impose shorter, more reasonable sentences.<sup>935</sup>

Judges have yet to make full use of the freedom accorded them by *Booker*. Statistics kept since *Booker* reveal that judges are still hewing fairly close to the Guidelines. Average sentence length has actually increased. Of nearly 55,000 defendants sentenced since *Booker*, 61% have received Guidelines sentences; almost 2% received sentences above the Guidelines; and 37% received below-Guidelines sentences.<sup>936</sup> Of these last, the majority—two-thirds—received the lower sentence on the government’s motion based upon substantial assistance in other prosecutions or under localized prosecutorial “fast-track” programs designed to clear congested court dockets resulting primarily from a flood of undocumented immigrants in southwestern border states.

To help the Court of Appeals decide if my non-Guideline sentences are reasonable I now videotape the sentences. The appellate judges can see the defendant and his family in a way

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<sup>935</sup>It is important to emphasize that *United States v. Booker*, the decision that declared the federal Sentencing Guidelines unconstitutional and rendered them advisory, was not based on their severity or the minimal discretion left to sentencing judges. Rather, they relied on the sentencing judge’s power, under the Guidelines, to sentence convicted defendants on the basis of facts not found by a jury, in violation of the Sixth Amendment guarantee of trial by jury. The rationale of the decisions is almost purely theoretical. At sentencing, I always ask the defendant if he or she wishes a jury to determine operative issues of fact that affect the sentence. The answer is, invariably, “No.”

<sup>936</sup>*See* U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (Mar. 2006); *see also* Douglas Berman, *Perspectives on Booker’s Potential*, 18 FED. SENT’G REP. 79, 80 (2005) (“[A] culture of guideline compliance has persisted after *Booker*.”).

similar to that of the trial judge.<sup>937</sup>

The judiciary's hesitancy to depart from the Guidelines with any frequency is not surprising when one considers that only about 100 of the more than 800 active federal judges were confirmed before the Guidelines took effect.<sup>938</sup> Most federal trial judges have never sentenced under any other program, and so they are more likely to rely heavily on the Guidelines system—with its great severity, inordinate focus on criminal history, rigidity, and exclusion of mitigating concerns. Moreover, such sentencing requires less time in thought and less stress on the judge than fashioning individual sentences.<sup>939</sup> Federal judges may also be exercising self-restraint out of apprehension about possible action by Congress that would reinstate a mandatory system.<sup>940</sup>

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<sup>937</sup>*In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004).

<sup>938</sup>Federal Judicial Center website, Federal Judges Biographical Database, [www.fjc.gov/history/home.nsf](http://www.fjc.gov/history/home.nsf) (search for judges confirmed after November 1, 1987, the date the guidelines took effect).

<sup>939</sup>For the more difficult individual assessment when the Guidelines are not automatically followed, see, e.g., *United States v. Hawkins*, 380 F. Supp. 2d 143 (E.D.N.Y. 2005), *on remand* 119 F. App'x 318 (2d Cir. Dec. 30, 2004); *aff'd* 229 F. App'x 107 (2d Cir. Apr. 20, 2007).

<sup>940</sup>*See Judiciary Asks Congress to Tread Carefully with Sentencing*, THIRD BRANCH, Apr. 2006, at 1, 4-5 (describing congressional testimony by federal judges that no legislation was required in response to *Booker* because of the high rate of compliance with the Guidelines). The judges on the Sentencing Commission have also urged on Congress the desirability of further studies. Delay may allow cooling down of some legislators who are piqued by the *Booker* case and what they conceive to be frustration of their desire for harsher uniform sentences by excessively independent judges. Delay is often critical as it was when President Jefferson was determined to reduce the power of the Supreme Court and destroy Chief Justice Marshall. *See* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 223 (2005) (“[T]ime is of the essence in the American system: a decision delayed may turn out very differently when finally confronted in the fullness of time.”).

## Regional Differences

There are broad regional differences with respect to the willingness to depart downward from the Guidelines. Judges in the Northeast, for example, tend to depart more often than those in the Southeast.<sup>941</sup> There are a number of possible explanations for this variation. Better support and treatment services in dense urban districts such as the Eastern District of New York may make intensive supervision outside of prison more feasible, permitting shorter terms of incarceration. Such districts may also have a higher rate of first-time offenders, who would be likely objects of mercy.<sup>942</sup> Crimes falling under the same broad rubric—e.g., fraud—may differ significantly in different regions of the country.<sup>943</sup> This variation is not a product of *Booker*: even under the mandatory Guidelines, rates of departure differed from one circuit to another,<sup>944</sup>

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<sup>941</sup>U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 86 (Mar. 2006) (after *Booker*, lowest rates of Guidelines-range sentences are in the Second Circuit, comprising New York, Connecticut, and Vermont; Third Circuit, comprising New Jersey, Delaware, and Pennsylvania; and the District of Columbia; highest rates of Guidelines-range sentences are in the Fifth Circuit, comprising Texas, Louisiana, and Mississippi; Eleventh Circuit, comprising Alabama, Georgia, and Florida; and Fourth Circuit, comprising Virginia, West Virginia, South Carolina, and North Carolina).

<sup>942</sup>Noted by Sentencing Commission Chair and Federal District Judge Ricardo Hinojosa, in conversation with author and other judges of Eastern District of New York, in Brooklyn, N.Y. (May 17, 2006).

<sup>943</sup>See U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCES 100 (2004) (“The types of fraud sentenced in the Southern District of New York (average fraud sentence 23.5 months) are different than the frauds sentenced in the District of North Dakota (average sentence 11.4 months).”).

<sup>944</sup>The relative Circuit rates of departure before *Booker* are somewhat similar to those after. See U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING D-10 to D-14 (Mar. 2006) (table of Guideline application trends).

as did appellate case law.<sup>945</sup> A significant contributor to the variation is diverging regional public opinion about what crimes should be punished and how severely.

From its colonial beginnings, the United States's leaders recognized that each region of this widely dispersed and heterogeneous land has different needs and different views. One of the fundamental reasons The People adopted the federal Constitution was to provide a system for resolving different views peacefully, primarily through the national legislature. It was understood by the leaders as well as by the ratifying voters that there would be regional and group differences that had to be mediated by the federal government if the nation were not to break apart.<sup>946</sup>

This sectionalism has persisted, and has long been evident in regional differences in responses to crime.<sup>947</sup> Out of respect for variations in local circumstances, crime control

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<sup>945</sup>See, e.g., *United States v. Koon*, 45 F.3d 1303, 1308 (1996) (Reinhardt, J., dissenting from denial of motion for rehearing en banc) (noting that Ninth Circuit and First Circuit differed on permissibility of departures on basis of “personal or professional consequences of conviction,” trial court’s ability to depart “on the basis of any factor the presence of which is ‘out of the ordinary’ or ‘unusual,’” and standard of appellate review of trial court decision to depart); see also U.S. SENT’G COMM’N, *FIFTEEN YEARS OF GUIDELINES SENTENCES* 93 (2004) (“Sentencing can be influenced by differences among the districts and circuits in their sentencing case law . . .”).

<sup>946</sup>See, e.g., *THE FEDERALIST* NO. 9 (Alexander Hamilton) (promoting a federal union as “a barrier against domestic faction” such as plagued the “[p]etty republics of Greece and Italy”), NO. 10 (James Madison) (chief advantage of federal union would be “its tendency to break and control the violence of faction”); Carl Van Doren, *Introduction to THE FEDERALIST* v, xi (lim. ed. 1945) (describing “a time when serious Americans could prefer to see the newly independent states . . . become a number of regional confederations”); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 28-30 (2005) (describing the problem of “factions” and the Framers’ attempts to solve it).

<sup>947</sup>See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002) (tracing diverging trends of Northern abolition and Southern retention of capital punishment beginning in the early 19th century); WILLIAM KUNTZ, *CRIMINAL SENTENCING IN THREE*

historically has been the almost exclusive province of the states.<sup>948</sup> Only in the mid-1960s did the federal government begin to play a significant role in the formulation of criminal justice policy. Until the mid-1980s, federal judges were accorded the discretion to respond to local conditions, permitting consistency in a geographic area between the overlapping state and federal systems. When the Act that created the federal Guidelines was drafted, a number of legislators disregarded this history and insisted on national uniformity in federal sentencing. Although this effort was partially successful on its own terms—“unwarranted disparity,” as defined by the Commission, was reduced<sup>949</sup>—it created tensions in districts that attempted to deal with the special needs of the communities in which they operated.<sup>950</sup> The Commission

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NINETEENTH-CENTURY CITIES (1988) (comparing sentencing in Boston, New York, and Philadelphia during the nineteenth century and noting, e.g., the significantly harsher sentences handed down in New York for forgery, probably as a consequence of that city’s role as a major banking center); U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 93 (March 2006) (“Research sponsored by the Department [of Justice] in the 1970s showed that judges differed in the importance they placed on various factors depending on the region in which they sat.”).

<sup>948</sup>*See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.) (stating that Congress “has no general right to punish murder committed within any of the States,” and that it is “clear . . . that congress cannot punish felonies generally”).

<sup>949</sup>The research of the Sentencing Commission demonstrated that “most of the ‘variance’—the deviation of sentences around the average—among sentences in the preguidelines era was unaccounted for in statistical studies. Only 30 to 40 percent of the variance could be explained by characteristics of the offense or offender, leaving open the possibility of considerable arbitrary variation. Today, approximately 80 percent of the variance in sentences can be explained by the guidelines rules themselves.” U.S. SENT’G COMM’N, *FIFTEEN YEARS OF GUIDELINES SENTENCES* xi (2004).

<sup>950</sup>Under the Guidelines, regional variations in sentencing for drug trafficking cases remained high; “It has also been argued that departure can be used to ameliorate the

attempted to squash, rather than mediate, regional sentencing variation. It still has yet to produce any detailed studies that might shed light on the reasons for the enduring disparities in sentencing among judges from different sections of this large and diverse country, contenting itself with reporting them. Our district judges in the New York City area, for example, have always imposed sentence lower than those in the rest of the country. The Court of Appeals for the Second Circuit now seems to have recognized that different problems in different regions may require different sentences.<sup>951</sup> The reasons should be examined by the Sentencing Commission.

#### Lessons for the Law

What have we learned from the United States's history? The most important lesson, perhaps, is the need for modesty about our ability to manipulate and change institutions to better protect the public and improve the lives of criminals. The rehabilitative era and the recent just deserts regime both overestimated the power of institutional solutions. The Progressives erred in believing that they had the means to rehabilitate almost every offender; the punitive populists, in believing that they could displace judicial discretion with clear, minutely detailed rules.

Another lesson is that there is need for restraint in the use of criminal law to control society. There are many ways in which people deviate from social norms: e.g., abusing drugs,

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unwarranted disparity that can arise when some offenders are prosecuted in federal court while others are prosecuted in state court where sentences are more lenient." *See* U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCES 112 (2004).

<sup>951</sup>*See* Mark Hamblett, *Mindful of "Booker," Circuit Revises Sentencing Opinion*, N.Y.L.J. Oct. 16, 2007 at 1 (discussing *United States v. Cavera*, No. 05-CR-4591, --- F.3d ---, 2007 WL 2965407 (2d Cir. Oct. 11, 2007), and suggesting the court can consider that the threat of guns in an urban environment can be considered by the sentencing judge).

jumping turnstiles, cheating on taxes, committing minor acts of theft or vandalism, driving without a license, or violating the technical conditions of probation or parole. Imprisonment is unnecessarily harsh, and unduly costly, for most of these offenses. Many are follies of youth that pass with age. Others can be better remedied through administrative controls and the provision of better social services, including education and welfare, than by recourse to the criminal justice apparatus.

A final conclusion is that the imposition of appropriate, effective punishment requires personal attention to the individual under judgment and a continuing struggle with—not to say resolution of—longstanding philosophical questions about the purposes of punishment, as well as the duty of the well-to-do towards their less-advantaged fellow citizens.

Justice Thurgood Marshall put it well when he wrote:

When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.<sup>952</sup>

As detailed above, in the nineteenth and most of the twentieth century American prison and punishment reforms were designed primarily to rehabilitate the prisoner as a protection against further crime. In recent years there has been a perception by many that attempts at rehabilitation have failed; a movement towards theoretically-based, severe, fixed punishments based primarily upon the nature of the crime has gained momentum. Although the rationales of

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<sup>952</sup>*Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring), *overruled* by *Thornburgh v. Abbott*, 490 U.S. 104 (1989); *see also* Anna C. Burns, *Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoners' First Amendment Rights*, 15 J.L. & POL'Y

punishment have been debated since antiquity,<sup>953</sup> two eighteenth-century philosophers set the terms of the contemporary debate in the United States: Immanuel Kant and the retributive just deserts model<sup>954</sup> and Jeremy Bentham's utilitarian, general deterrence theory.<sup>955</sup>

Given the divergence in underlying assumptions and theory, the competing retributivist and utilitarian theories suggest opposing methods for ascertaining proper penalties. Under a Kantian model, the extent of punishment is required to neatly fit the crime. "Whoever commits a crime must be punished in accordance with his desert."<sup>956</sup>

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1225 (2007).

<sup>953</sup> Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in *THE OXFORD HISTORY OF THE PRISON* 5 (Norval Morris & David J. Rothman, eds., 1995) (describing Plato's philosophy of punishment); RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW* 6 (2000) (describing that of Aquinas).

<sup>954</sup> DIANE COLLINSON, *FIFTY MAJOR PHILOSOPHERS: A REFERENCE GUIDE* 89 (1992); *see also, e.g.*, IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Vasilis Politis ed. & trans., Everyman's Library 1994) (1781); IMMANUEL KANT, *THE MORAL LAW* (Kant's Groundwork of the Metaphysics of Morals) (H.J. Paton ed. & trans., Hutchinson Univ. Library 3d ed. 1965) (1785). On the assumption of the editors that most readers will have some familiarity with these theories, we have shortened this section.

<sup>955</sup> *See* JEREMY BENTHAM, *BENTHAM'S POLITICAL THOUGHT* 167-68 (Bhikhu Parekh ed., Harper & Row 1973) ("For the most part it is to some pleasure or some pain drawn from the political sanction itself, but more particularly . . . to pain that the legislator trusts for the effectuation of his will."); *see also* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 144 (5th ed. 1989) ("Bentham sees punishment as the deliberate infliction of pain and suffering but justifies it as a necessary evil when the good it produces overall outweighs its harmful effects."); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 *AM. J. JURIS.* 136 (1994); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 493 (E.D.N.Y. 1993) (Bentham focused upon proportionality and deterrence as goals of sentencing); MARKUS D. DUBBER & MARK G. KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS* 1 (2005); *cf.* MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 246 (2004) ("[W]hatever penalties we choose, our focus should be on the future, on reform and reintegration [into society].").

<sup>956</sup> EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 4 (1996).

Two main problems are presented by this just deserts approach. First, the degree of the earned desert—that is to say the extent or length of the appropriate punishment—is subjective. The upper and lower limits of the punishment can be very high or very low, depending on personal views and taste. Second, the “earned” punishment may be quite cruel and do more harm to society, the criminal, and his family, than anyone, fully aware of the costs, would find permissible.<sup>957</sup>

Determining the appropriateness of sanction differs under Bentham’s utilitarian approach, although it too poses challenging tasks for the sentencer.

This model proposes the following:

[T]he factors . . . [to be considered] are the need to set penalties in such a way that where a person is tempted to commit one of two crimes he will commit the lesser, that the evil consequences . . . of the crime will be minimized even if the crime is committed, that the least amount possible of punishment be used for the prevention of a given crime.

Obviously, one problem with utilizing a system based only upon calculation of benefits and costs is that “[i]t is difficult . . . to determine when more good than harm has been achieved . . . .”<sup>958</sup>

The federal—and to a lesser extent, state—guidelines were strongly influenced by the retributivist position. Despite Congress’ direction that the Sentencing Commission consider eleven specific offender characteristics in establishing categories of defendants—age, education,

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<sup>957</sup>*Cf.* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 411 (1979) (“Some of the anguish and humiliation that prisoners seem almost universally to endure, and some of the hard treatment that is often their lot, seem unnecessary for the purpose of upholding the law through condemnation of lawbreaking. To the extent that this is so, and to the extent that such features may be said to be part of the system of criminal liability and not simply a constant aberration within it, punishment is . . . unjustifiable.”).

<sup>958</sup>*United States v. Concepcion*, 795 F. Supp. 1262, 1272 (E.D.N.Y. 1992).

vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood<sup>959</sup>—and deal with them flexibly,<sup>960</sup> the Commission deemed only three factors primarily relevant: criminal history, dependence on crime for a livelihood, and acceptance of responsibility for wrongdoing.<sup>961</sup> This focus on past wrongdoing to the exclusion of past merit, and on the crime itself to the exclusion of other characteristics of the defendant, tilted the sentencing determination in the direction of retribution and de-emphasized factors that would call for mitigation of punishment in individual cases. The Commission also drastically limited the use of alternative sanctions in ways that seemed inconsistent with the enabling legislation.

Critical to a rational program for sentencing, and of what used to be called “corrections” (the New York City authority in charge of jails is still called the Department of Corrections) is one of preparing the offender for a lawful life. The problem is complex because a large proportion of the incarcerated, or those on probation, parole, or some form of supervised release, have drug and alcohol addictions, cannot control their anger, have severe mental problems, lack vocational skills, have an inadequate basic education, and retain no stable family supports. Release into former surroundings without adequate housing, physical and mental medical

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<sup>959</sup>28 U.S.C. §§ 994(d)(1)-(11).

<sup>960</sup>S. REP. NO. 98-225, at 52 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3355-57.

<sup>961</sup>U.S. SENT’G GUIDELINES MANUAL §§ 5H1.1-5H1.6 (Specific Offender Characteristics, including Criminal History (§ 5H1.8)), 4B1.3 (Criminal Livelihood), 3E1.1 (Acceptance of Responsibility) (2007). Other common adjustments include leadership role in the offense and obstruction of justice. U.S. SENT’G GUIDELINES MANUAL §§ 3B1.1-.4, 3C1.1 (2007).

treatment, a job, or interpersonal skills quickly leads to a return to crime and an even longer period of arid incarceration.

The federal system (and those of a number of states) has a prison vocational training system, and encourages General Education Diplomas and other in-prison courses.<sup>962</sup> It transfers long-term prisoners six months before their prison terms expire to local community facilities where the prisoner is released during the day to find a job and reintegrate with family, while returning each night to a community treatment facility where he can receive assistance by social workers and other personnel.<sup>963</sup>

A supervised release period, usually of some three years, follows, with close control by a local court probation service.<sup>964</sup> The assigned probation officer requires frequent reporting, helps the offender find employment, tests for drugs, and can provide for substance abuse and other treatment.<sup>965</sup> Failure of the defendant to conform will result in a charge being brought in court. The original sentencing judge can resentence the offender to prison for periods of up to a

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<sup>962</sup>FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2004 15-20 (2005) (detailing services available, including occupational training, a General Education curriculum, special education for those with learning disabilities, parenting courses, mock job fairs, substance abuse education, and psychological treatment). The vocational program was founded in 1934 and produces goods for government offices and sale on the market. *See generally* FEDERAL BUREAU OF PRISONS, FACTORIES WITH FENCES: THE HISTORY OF FEDERAL PRISON INDUSTRIES (1996).

<sup>963</sup>18 U.S.C. § 3624(c) (providing that inmates may be transferred to such facilities for the last ten percent of their sentences, not to exceed six months).

<sup>964</sup>18 U.S.C. § 3583.

<sup>965</sup>OFFICE OF PROBATION & PRETRIAL SERV., ADMIN. OFFICE OF THE U.S. COURTS, JUD. CONF. COMMITTEE ON CRIM. LAW, THE SUPERVISION OF FEDERAL OFFENDERS, Monograph 109, ch. IV (2005), [http://www.fd.org/pdf\\_lib/Monograph%20109.pdf](http://www.fd.org/pdf_lib/Monograph%20109.pdf).

few years or order other forms of supervision such as a residential drug program.<sup>966</sup>

Strict governmental supervised release with reincarceration for violation, as in the federal supervised release programs under federal guidelines provides some protection against recidivism. The work of nongovernmental agencies helping those released from prison may be even more useful. For example, with the organization, Sponsors, Inc., Eugene, Oregon provides re-entry help for ex-offenders. An interview with a member of the Board of Directors, Dr. Michael D. Weinstein, suggests that Sponsors has had a useful effect in reducing recidivism.

These necessary transition services have occasionally come under attack. A decade ago, in a paroxysm of cruelty, the federal government cut off all prisoner eligibility for federal grants that could assist them in earning college credits and degrees.<sup>967</sup> It also drastically reduced the amount of federal grant money that the states could spend on education for prisoners.<sup>968</sup>

Fortunately, in at least one area, the treatment of drug-addicted offenders, this sort of governmental malevolence is becoming less common as utilitarianism and rational analysis trumps an extreme form of self-righteous Kantian “just deserts” that would shock Kant himself.

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<sup>966</sup>18 U.S.C. §§ 3583(e), (g).

<sup>967</sup>Pub. L. No. 103-322 (1994) (amending 20 U.S.C. § 1070a(b)(8)).

<sup>968</sup>Before 1998, 20 U.S.C. § 9222 provided that at least ten percent of the funds provided to states under the federal Workforce Investment program was to be spent on prisoner education. The Workforce Investment Act of 1998, Pub. L. No. 105-220 § 222(a)(1), amended that section to provide that *no more than* ten percent of these funds be spent on prisoners. Section 225 of the 1998 Act also banned the provision of post-secondary education to prisoners using Workforce Investment funds. Similarly, the Vocational Education Act had long provided that a minimum of one percent of federal funds granted under the program were to be spent on prisoner vocational training. A 1998 amendment to the Act, Pub. L. No. 105-332 § 112(a)(2)(A), limited such spending on individuals in prisons or other state institutions to *no more than* one percent of the funds granted.

Courts and legislatures are increasingly recognizing that the revolving door—long periods of incarceration with minimal help to the criminal on release—is too expensive financially and morally.<sup>969</sup>

The problem of drugs emphasizes the continuing need for specialized, rehabilitative programs. Drugs are a primary engine of crime and prison population growth in the United States. Drug addiction is pandemic among federal inmates. More than two-thirds of jail inmates are dependent on or abuse alcohol or drugs.<sup>970</sup> Inmates with drug addictions are fifty percent more likely than other inmates to have a criminal record and nearly twice as likely to be homeless.<sup>971</sup> Over a third of all convicted federal inmates were under the influence of drugs or alcohol at the time of their offense; sixteen percent of those who committed crimes (and more than a quarter of those who committed property or drug crimes) did so in order to get money for drugs.<sup>972</sup> Fifty-seven percent of all federal prisoners reported using drugs regularly prior to incarceration.<sup>973</sup> “The use of illicit drugs and alcohol is a central factor driving correctional

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<sup>969</sup>*See, e.g.,* David Leitenberger, *Richland County Model Reentry Court*, in NATIONAL CENTER FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2005* 100-101 (2005) (describing court-monitored reentry program involving coordination of law enforcement, social services, state executive government, and probation personnel to smooth released inmate’s transition to freedom).

<sup>970</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES 1* (2002).

<sup>971</sup>*Id.*

<sup>972</sup>*Id.*

<sup>973</sup>*Id.* at 7.

growth.”<sup>974</sup> That growth has been enormous: between 1990 and 2002, the number of persons under federal corrections supervision grew by 150%.<sup>975</sup>

Recidivism is a marked problem with drug offenses. More than half of those charged with federal drug offenses in 1999 had been previously convicted; thirteen percent had five or more prior convictions.<sup>976</sup> These offenders are not necessarily significant dealers; fourteen percent were convicted for drug use alone.<sup>977</sup>

Addiction is also a key factor in many violations of the conditions of supervised release. In 2001-02, 18% of all federal arrests were for supervision violations.<sup>978</sup> The number of arrests for such violations increased 68% between 1994 and 2002, against an increase of 51% in all federal arrests.<sup>979</sup> Many of these violations were due to substance abuse.<sup>980</sup>

These statistics demonstrate that the current approach to drug-related crime has been

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<sup>974</sup>*Id.* at 2.

<sup>975</sup>The experience in the states was much the same. Recently, the Rockefeller drug law penalties that were so draconian were sharply reduced and power to reduce prior sentences was granted after a widespread public campaign. *See, e.g.,* Edward v. Maggio, *New York’s Rockefeller Drug Laws, Then and Now*, N.Y. ST. B.A.J., Sept. 2006, at 30-34.

<sup>976</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984-99 6 (2001).

<sup>977</sup>*Id.* at 11.

<sup>978</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING 2002 7 (2005).

<sup>979</sup>*Id.* at 26.

<sup>980</sup>U.S. Dist. Ct. for the Dist. of Oregon, *Interagency Agreement for the Creation of an Alternative Drug Court for Handling of Supervised Release and Probation Violations* 1 (2005) (on file with author) (“[T]here is a very high correlation between substance abuse and violations of supervision.”).

ineffective. “[I]ncarceration in and of itself does little to break the cycle of illegal drug use and crime, and offenders sentenced to incarceration for substance related offenses exhibit a high rate of recidivism once they are released . . . .”<sup>981</sup>

Intensive drug supervision—particularly in the first few years after release from prison—assists in the rehabilitation of offenders and increases public safety. Studies by the federal Government Accountability Office, the RAND Institute, independent researchers, and the Department of Justice have almost uniformly concluded that recidivism rates are substantially reduced for graduates of drug courts and comparable programs and, to a lesser but significant degree, for participants who do not graduate as well. In a drug court the judge acts in a welfare capacity, supervising the addict, with the aid of social workers and others, to keep the malefactor off of drugs. These reductions in recidivism tend to endure.<sup>982</sup> Many of the offenders who enter drug court programs receive substance abuse treatment that would otherwise be unavailable. “Over 70 percent of drug court participants have been incarcerated at least once previously, almost three times more than have been in drug treatment; thus for many

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<sup>981</sup>DRUG CT. CLEARINGHOUSE & TECH. ASSISTANCE PROJECT, U.S. DEP’T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (unpaginated) (1998), <http://www.ncjrs.gov/html/bja/decade98.htm>.

<sup>982</sup>*See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS (2005); GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE (2004); SALLY SATEL, DRUG TREATMENT: THE CASE FOR COERCION (1999); C. PETER RYDELL & SUSAN S. EVERINGHAM, RAND INSTITUTE, CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS xi-xix (1994) (conducting extensive empirical analysis and concluding that, each dollar spent on treatment is as effective in reducing cocaine usage as \$7.23 spent on domestic law enforcement, \$10.76 spent on drug interdiction, or \$23.03 spent on efforts to eliminate drug production in the source countries); *see also* S. RES. 136, 109th Cong. (2005) (“[T]he results of more than 100 program evaluations and at least 3 experimental studies have yielded definitive evidence that drug courts increase treatment retention and reduce substance abuse and crime among drug-involved adult offenders . . .”).

offenders, drug court is the route of entry into rehabilitation.”<sup>983</sup>

Drug supervision programs decrease judicial and societal costs. A study of a drug court in the state of Oregon found that the total investment cost per offender was \$1,441 less than in traditional court proceedings. When outcome costs (including arrests, bookings, court time, jail time, treatment and probation) and victimization costs were included, the total savings was over \$5,000 per offender.<sup>984</sup> The state of California estimates that it saves \$1.31 on prison costs alone for every dollar spent on drug courts.<sup>985</sup> Every day an offender is kept in community supervision instead of in prison represents substantial savings to the government.<sup>986</sup> Significant amounts are also saved in indirect costs by increasing tax revenue from employed former drug users and decreasing their utilization of social services.<sup>987</sup> Between 2001 and 2004, forty-two

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<sup>983</sup>SALLY SATEL, DRUG TREATMENT: THE CASE FOR COERCION (1999) (unpaginated) (citation omitted); BUREAU OF JUSTICE ASSISTANCE (BJA) DRUG COURT CLEARINGHOUSE, AMERICAN UNIVERSITY, FEDERAL DRUG COURT ACTIVITY (2006).

<sup>984</sup>See SHANNON CAREY & MICHAEL FINIGAN, NPC RESEARCH, INC., A DETAILED COST ANALYSIS IN A MATURE DRUG COURT SETTING: A COST BENEFIT EVALUATION OF THE MULTNOMAH COUNTY DRUG COURT II-III (2003), *available at* <http://www.npcresearch.com/Files/NIJ%20Multnomah%20County%20Drug%20Court%20Cost%20Analysis%20Revised%20%2008-26-03%20final.pdf>.

<sup>985</sup>STATE OF CAL. DEP’T OF ALCOHOL & DRUG PROGRAMS, COMPREHENSIVE DRUG COURT IMPLEMENTATION ACT OF 1999, FINAL REPORT TO THE LEGISLATURE 2-3 (2005), *available at* [http://www.prop36.org/pdf/CDCI\\_FinalReportToLeg786D6.pdf](http://www.prop36.org/pdf/CDCI_FinalReportToLeg786D6.pdf).

<sup>986</sup>In 2005, it cost the federal government \$3,450 annually to supervise an offender on probation and \$2,080 to supervise an offender on supervised release pending trial. By contrast, it cost \$23,432 annually to maintain an offender in a federal prison and \$20,844 to detain him in a community corrections facility. Memorandum from the Admin. Office of the U.S. Courts to the Chief Probation & Pretrial Officers 1 (May 24, 2006), *available at* [http://www.fd.org/pdf\\_lib/Costs%20of%20Incarceration%20and%20Supervision%202005.pdf](http://www.fd.org/pdf_lib/Costs%20of%20Incarceration%20and%20Supervision%202005.pdf).

<sup>987</sup>See Michael D. Weinstein, *State Can Reduce the Costs of Substance Abuse*, REGISTER-GUARD, May 31, 2006, at A9 (“[F]or every \$1 spent on prevention and treatment, \$5

percent of the California program participants obtained employment while in the drug court program; eighty percent of those who were homeless obtained housing; ninety-four percent of the children born to women in the program were drug-free.<sup>988</sup> Thus, even in purely monetary terms, drug courts and programs yield net benefits for the courts and communities that use them.

In 1998 the United States Department of Justice summed up the effect of court supervision of drug users:

The appeal of the drug court lies in many sectors: more effective supervision of offenders in the community; more credibility to the law enforcement function (arrests of drug offenders are, indeed, taken seriously, even by court systems that are inundated with cases); greater accountability of defendants for complying with conditions of release and/or probation; greater coordination and accountability of public services provided, including reducing duplication of services and costs to the taxpayer; and more efficiency for the court system by removing a class of cases that places significant resource demands for processing, both initially as well as with probation violations and new offenses that otherwise would undoubtedly occur. These benefits, dramatic as they may be, do not, however, explain the tremendous personal impact that drug courts have on all who have been involved with them . . .<sup>989</sup>

The tendency of former addicts to relapse into further drug use is substantial and

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to \$7 is saved on emergency room visits, law enforcement costs and criminal justice system activity. This does not even account for the savings in lives, property loss, health effects and emotional damage caused by alcohol and drugs.”) (citing Oregon State Office of Mental Health & Addiction Services business plan and California experience).

<sup>988</sup>STATE OF CAL. DEP’T OF ALCOHOL & DRUG PROGRAMS, COMPREHENSIVE DRUG COURT IMPLEMENTATION ACT OF 1999, FINAL REPORT TO THE LEGISLATURE 2-3 (2005), available at [http://www.prop36.org/pdf/CDCL\\_FinalReportToLeg786D6.pdf](http://www.prop36.org/pdf/CDCL_FinalReportToLeg786D6.pdf); see also Brandon C. Welsh, *Monetary Costs and Benefits of Correctional Treatment Programs: Implications for Offender Reentry*, 68 FED. PROBATION 2, Sept. 2004 (finding almost uniform conclusion amongst studies that drug courts result in cost-benefit savings).

<sup>989</sup>DRUG CT. CLEARINGHOUSE & TECH. ASSISTANCE PROJECT, U.S. DEP’T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (unpaginated) (1998), <http://www.ncjrs.gov/html/bja/decade98.htm>.

continuing. In our court in the Eastern District of New York, as well as in other federal courts, more and more judges, acting with probationary services, are closely monitoring and encouraging those released from prison to get jobs and refrain from using drugs. Continuing intervention by the sentencing judge helps overcome addiction.<sup>990</sup> Attention to the needs of addicted defendants is only a special example of the general need for sentences and procedures that address not just the defendant's crime and criminal behavior, but the entire person standing before the court.

In principle, there is no connection between the degree of discretion afforded a judge to individualize sentencing and the severity of punishment. In practice, the two are tightly bound. The "flexibility" introduced into modern sentencing by the elimination of mandatory penalties in the early years of the American republic "recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the [Supreme] Court as a humanizing development."<sup>991</sup>

In modern American capital punishment jurisprudence, use of mitigating factors that would justify a lesser sentence is a primary technique for achieving individualized sentences.<sup>992</sup>

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<sup>990</sup>See Judge Charles P. Sifton & Judge Jack B. Weinstein, Report on a Proposed Intensive Post-Sentence Drug Supervision Program for the Eastern District of New York (Jan. 13, 2006) (unpublished, on file with author) (recommending such a program for adoption by the federal district courts).

<sup>991</sup>Woodson v. North Carolina, 428 U.S. 280, 298 (1976); *see also id.* at 291 (discretionary sentencing "remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty").

<sup>992</sup>See, e.g., Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) ("[I]ndividualized decision is essential in capital cases;" it requires that "the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>993</sup> The change to discretionary sentencing was motivated by “the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.”<sup>994</sup> Binding guidelines rebuke this belief.

A perceptive article by a Canadian scholar asks whether sentencing is better under guidelines or without them.<sup>995</sup> If better means quicker and easier for the judge, then sentencing under guidelines is better; scores of defendants can be sentenced in a single day with almost no judicial cerebration. If better means fairer or more consistent with rational grounds for sentencing in individual cases, sentencing under the federal Guidelines is worse, although the degree of damage wrought by the Guidelines varies from court to court. It is symptomatic that Judge Vincent Broderick, a representative of the federal judges in their struggle with the Guidelines, had to constantly advise his colleagues to downward “Depart, depart, depart!”<sup>996</sup>

Those of us in the trial courts who face real people caught up in the justice system have

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sentence less than death”) (emphasis in original).

<sup>993</sup>Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

<sup>994</sup>Williams v. New York, 337 U.S. 241, 249 (1949).

<sup>995</sup>See Anthony N. Doob, *The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There*, in *THE POLITICS OF SENTENCING REFORM* 1, 3 (Chris Clarkson & Rod Morgan eds., 1995).

<sup>996</sup>*Editors' Notes*, 7 *FED. SENT'G REP.* 166 (1995).

long looked forward to the day when the Sentencing Commission would abandon the overly harsh and mechanistic jargon-ridden system it has created. The federal Guidelines were, in large part, a failure because—unlike many state equivalents<sup>997</sup>—by excess rigidity and complexity, they attempted to banish humanity from the sentencing process. In contrast, flexible state sentencing guidelines work fairly well. And since they have become “advisory,” federal guidelines, as indicated below, have proven more useful and sensible.

If you had walked into a courtroom in the federal District Court for the Eastern District of New York during a sentencing proceeding before enactment of the guidelines, you would have heard discussion of right and wrong, responsibility and retribution, deterrence and rehabilitation. The judges would have met in small groups to discuss each sentence with the probation officer.<sup>998</sup> Walking into the same courtroom under mandatory guidelines, you would have heard a discussion of numbers and grids, application notes, cross-references, and cases construing guideline arcane. The frequency with which the Court of Appeals thought it necessary to remand for resentencing on the basis of technical guideline “violations” indicated a failure to acknowledge that sentencing requires human interaction. Form strangled substance.

How can a judge bring much needed heart to the process? The sentencing judge may or may not write an opinion explaining his or her reasoning to the public and the appellate court.

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<sup>997</sup>See, e.g., Editorial, *Sentencing Guidelines of the Right Sort*, 78 JUDICATURE 168 (Jan./Feb. 1995) (criticizing federal guidelines as both more rigid and more draconian than state sentencing systems).

<sup>998</sup>We are now re-introducing in the Eastern District of New York use of the conference system in individual cases. The sentencing judge meets with the chief probation officer and two judges to discuss the sentence. The decision is not reached until the full sentencing hearing.

Orally, as a matter of humanity and for specific deterrence, the sentencing judge should in every case explain that reasoning at the time sentence is imposed so those before him, their families, and the public understand the process. I now attach to every sentencing judgment a memorandum explaining my decision, and I have prepared a video tape of the sentencing so that the Appellate court can see and hear the defendant and others involved.

Sentencing proceedings are as much dialogues as pronouncements. Under the Federal Rules of Criminal Procedure, the court, before imposing sentence, must “address the defendant personally and determine if the defendant wishes to make a statement and to present any information.”<sup>999</sup> Often, both the pre-sentence report and a long evidentiary hearing reveals subtleties of the defendant’s background, and his relation to the victim, his family and the community, that need to be considered before imposing the sentence. This practice of dialogue requires two-way communication. Recent cases have emphasized the importance of this interaction.<sup>1000</sup> In my experience this personal contact does not unduly conflict with the desirability of some uniformity. Nor does it result in reliance on biases, stereotyping, or discrimination by our professional judges.

Not all the law is conducive to a free interchange between defendant and judge. The effect of a number of new sentencing statutes, the Federal Rules of Criminal Procedure, the

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<sup>999</sup>Fed. R. Crim. P. 32(c)(3)(c).

<sup>1000</sup>*See* United States v. Axelrod, 48 F.3d 72 (2d Cir. 1995) (vacating sentence because the sentencing judge failed to explicitly apprise the defendant of his right to speak); United States v. Maldonado, 996 F.2d 598, 599 (2d Cir. 1993); United States v. Gangi, 45 F.3d 28, 31 (2d Cir. 1995) (“[D]efendant must have an opportunity to respond to the government’s characterization of his post-sentencing cooperation.”).

Guidelines, and the caselaw controlling the sentencing process, taken together, is to favor a stylized interaction between judge and judged. Under the mandatory federal Guidelines, the sentencing judge was constrained to follow a long list of formalities when imposing sentence. Even under the advisory Guidelines, calculation of the sentence frames the discussion of the offense and offender. The danger is that sentencing will be performed by rote.

Clerical-mechanical requirements only underscore the necessity for human interaction when sentence is imposed. It is then that the judicial system relates most powerfully to the defendant as a person.

Face-to-face contact is important to the judge, for whom pronouncing sentences without human interaction would be an unacceptable derogation of the duty to provide individualized justice. As Professor Freed has noted, the judge's belief that he is doing justice is "essential to [his or her] participation" in the sentencing process.<sup>1001</sup> The requirement of face-to-face contact is also essential to the defendant, who has a right to be treated as an individual, and to know that he has been so treated.

Only the sentencing judge is in a position to put a human face on sentencing:

Unlike their trial court colleagues, appellate judges neither: look defendants in the eye . . . [n]or struggle with assessing whether an offender is beginning or ending a criminal career, appears to be dangerous or harmless, is a minnow in a sea of big fish, or has gone astray under unusually stressful circumstances and will not offend again. Appellate judges [do not see] large numbers of worried or stunned faces of spouses and children of the person being sentenced.<sup>1002</sup>

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<sup>1001</sup>Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 (1992).

<sup>1002</sup>See Judge Nathaniel Jones dissenting in *United States v. Davern*, 970 F.2d 1490, 1516 (6th Cir. 1992) (sentencing is "and must remain an intensely human process"); *United States v. Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987) (Baldock, J.) (sentencing, which "affects the most fundamental human rights . . . should be conducted with the judge and

Nor is such individualized justice within the mission of a sentencing commission.<sup>1003</sup>

Neither the once-removed court of appeals nor the twice-removed sentencing commission will ever see the defendant. The trial judge's use of the sentencing proceeding to make human contact is especially important in an era in which the overwhelming majority of prosecutions are disposed of without trial by a plea of guilt.<sup>1004</sup> Many defendants have no other day in court.

Remembering the human element has become increasingly important in an era of sentencing laws, including statutory minimums and Guidelines, that encourage judges to think of offenders as statistics. As one judge has noted, the Guidelines' "false aura of scientific certainty distances the court from the offender."<sup>1005</sup>

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defendant facing one another"); LOIS G. FORER, *A RAGE TO PUNISH* 171 (1994) ("We can heal our criminal justice system . . . only by deciding each case and imposing each sentence individually, one on one, one at a time."). In my courtroom, we make video recordings of all sentences so that, on appeal, the appellate court can "see" the defendant, his family, and his supporters as they interact with the judge at sentencing.

<sup>1003</sup>See U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (2007) (The Basic Approach (Policy Statement)) (describing role of sentencing commission in formulating generalized rules); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 n. 50 (1988) (describing computer analysis of 100,000 "criminal dispositions" as basis for Sentencing Guidelines); see also LOIS G. FORER, *A RAGE TO PUNISH* 169 (1994) ("[C]ommissions can deal only with generalities and norms; they cannot act upon specific cases and actual individuals.").

<sup>1004</sup>In 2003, 89% of all federal defendants were convicted; of these, almost 96% pleaded guilty. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 59 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0301.pdf>. Trials are more common in state courts, but still rare. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002 25-26 (2006) (nearly two-thirds of all defendants charged with a felony enter a plea of guilty; only five percent of all defendants proceed to trial).

<sup>1005</sup>Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1125 (1992) (quoting *Hearings Before the Subcomm. on Criminal Justice of the H.*

The psychological and emotional distance between the judge and those who are in court must not be allowed to become too great. As Professor Sovern, the former president of Columbia University, reminds us, “anyone who devotes his life to helping others must believe . . . that nothing here on earth is more important than appreciating the value of one human being.”<sup>1006</sup> Events in the last century have demonstrated our ability to visit the grossest injustices on people we permit ourselves to see as less than human.

In Roger K. Newman’s biography of Supreme Court Justice Hugo Black, the author quotes Professor Charles Reich on Justice Black’s approach to the cases before him: “Black started with people. ‘The first thing he saw in a case . . . was the human being involved—the human factors, a particular man or woman’s hopes and suffering; this became the focus of all his compassion.’”<sup>1007</sup> Such sympathy for the individuals before the court is more important at sentencing than in almost any other place in the law.

The Supreme Court has noted the significance of face-to-face contact in a variety of contexts. For example, its robust right-of-confrontation jurisprudence reflects the understanding that “[i]t is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”<sup>1008</sup> Treating a defendant as less than human is a kind of lie—one more difficult to tell in his presence. Similarly, decisions on demeanor evidence suggest the importance of tone and

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*Comm. on the Judiciary*, 100th Cong. 266 (1987) (testimony of Judge Robert W. Sweet)).

<sup>1006</sup>MICHAEL I. SOVERN, *OF BOUNDLESS DOMAINS* 9 (1995).

<sup>1007</sup>ROGER K. NEWMAN, *HUGO BLACK* 472-73 (1994).

<sup>1008</sup>*Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

body language in conveying information.<sup>1009</sup> This distinction has also been central to the Supreme Court’s opinions on the public’s right to observe criminal proceedings.<sup>1010</sup>

The sentencing proceeding is the prototypical situation in which face-to-face contact and empathy are essential. At such an encounter, the judge controls not only the language, but the manner, in which he or she speaks. At sentencing, the judge’s body language and visage must convey the message: “I respect you as a human being and I regret having to impose this heavy sentence. None of us likes having to send anyone to prison, but that is my duty in this case.”<sup>1011</sup> This thought cannot be conveyed by a judge whose attention is not on the defendant before him, but on sentencing manuals, appendices to manuals, and interpretations of manuals.

Sentencing commissions can reduce this distance between judge and judged. They can accomplish this by creating guidelines as suggestions for particular sentences, not as mandates (or the oxymoronic and unworkable “mandatory guidelines,” as some describe the federal rules). Guidelines can reemerge as the benchmarks some legislators, commentators, and judges have sought. Such guidance, and the statistical analysis it permits, encourages an ongoing colloquy about criminal sentencing among judges, the bar, and the public, without dehumanizing the judge and defendant in individual cases.

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<sup>1009</sup>See, e.g., *Stein v. New York*, 346 U.S. 156, 183 (1953); *United States v. Shonubi*, 895 F. Supp. 460 (E.D.N.Y. 1995), *vacated by* 103 F.3d 1085 (2d Cir. 1997).

<sup>1010</sup>See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring) (“As any experienced appellate judge can attest, the ‘cold’ record is a very imperfect reproduction of events that transpire in the courtroom.”).

<sup>1011</sup>For this reason in my court we offer each defendant a shirt, tie, and jacket so that he may appear in court well-dressed, rather than in prison garb, as a dangerous person different from us.

Recent efforts to reimpose the Guidelines as dispositive and to reduce judicial discretion are unfortunate.<sup>1012</sup> The Court of Appeals for the Second Circuit has been quite sensible in allowing trial courts to use their statutory discretion. Recently the Eastern District of New York reinstated the system of conference among the judges before difficult sentences.

There is a vast and rapidly proliferating literature on the Guidelines and legal questions left by recent Supreme Court decisions. Much of it addresses doctrinal issues of Commission mechanics and procedure. What is often missing is a proper reverence for “the mysteries of the human condition” that are implicated in the criminal justice system:

What is the nature of good and evil? Why do people commit crimes? Why do we all, as David Hume once wrote, contain a particle of the dove next to elements of the wolf and the serpent? Why do the wolf and serpent prevail in some of us so often and so violently, yet in others of us so seldom and so mildly? Looming in the foreground is yet another profound question, one that has been the subject of jurisprudential debate, and great confusion, since the dawn of law: Why do we punish wrongdoers? . . . Each of us hears conflicting and often inarticulate inner voices, one asserting that even the most contrite and reformed sinners must still pay some price for their sins, the other calling for mercy and forgiveness and asking us to empathize with the criminal. So it is not surprising that collectively we struggle to balance the form and amount of punishment that is appropriate, a struggle that lies at the heart of what we mean by “justice.”<sup>1013</sup>

These questions implicate the whole of sentencing theory and practice in their setting of mankind’s relationships with each other. Any decision concerning the appropriate punishment in a particular case will necessarily balance the objectives of retribution, incapacitation,

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<sup>1012</sup>See, e.g. *Rita v. United States*, 127 S. Ct. 2456 (2007) (federal appellate court may apply presumption of reasonableness if sentence is within the Guidelines range); cf. Robert W. Gettemen & Jenna L. Klatell, *Order on the Border*, LITIG., Summer 2007, at 8, 9 (difficulty of sentencing when discretionary).

<sup>1013</sup>Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627, 627, 638 (2004).

deterrence, and rehabilitation, and consider impacts on family and society.

A fully comprehensive sentencing system that provides an unchanging and absolute balance between the various sentencing rationales while permitting sentencing judges the appropriate level of discretion is not attainable.<sup>1014</sup> *A priori* ranking of the principles cannot guide the discretion of the judge and reduce discrepancies in sentences.<sup>1015</sup> All classic justifications are not appropriate bases for punishment in any given case; their relative importance differs from one individual and offense to another.<sup>1016</sup> Attempting to order the rationales for application to an entire criminal justice system may generate instability, as shifts in political power may result in unnecessary amendment of laws and concomitant legal confusion.<sup>1017</sup>

Individual judges should be permitted to consider all the traditional purposes of sentencing when determining an appropriate penalty. Such “[p]urpose-based analysis by judges may be the best hope for bringing justification to [criminal] sentences . . . .”<sup>1018</sup> Because of

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<sup>1014</sup>See 18 U.S.C. § 3553(a); *United States v. Blarek*, 7 F. Supp. 2d 192, 200 (E.D.N.Y. 1998).

<sup>1015</sup>Leon Pearl, *A Case Against the Kantian Retributionist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 276 (1982) (no system “currently exists [that provides] a fully satisfactory theory that both justifies punishment and provides a basis for just sentencing”).

<sup>1016</sup>See, e.g., *United States v. Taveras*, 424 F. Supp. 2d 446 (E.D.N.Y. 2006) (considering which rationales were relevant to defendant’s charged conduct in capital case).

<sup>1017</sup>In the Israeli Justice Goldberg Committee Report, for example, ten members believed that just deserts was the appropriate guiding principle; five believed that utilitarian concerns should predominate. See D. Ohana, *Sentencing Reform in Israel: The Goldberg Committee Report*, 32 ISR. L. REV. 591, 625, 632 (1998).

<sup>1018</sup>Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 478 (1992); see also

tensions between the various sentencing rationales, it is ultimately “the judges . . . who must sentence the convicted defendant within the limits set forth in legislation . . . [and] must determine [the] priorities[]” to assign to the rationales in a particular case.<sup>1019</sup> This is in accord with the traditional discretion of the trial court in sentencing.

Determination of the appropriate sentence is irreducibly an exercise in judgment. It requires a judge, presumably commissioned for his or her sagacity, to render what he or she believes to be justice in the individual case. “[I]nsistence upon clear rules can exact a high . . . price” in individual injustice. The emphasis among scholars and jurists on the procedure of sentencing tears the heart out of the imposition of sentence. It is an unnecessary concession to the argument that judicial discretion—the exercise of individual judgment by one trained for the task—is not to be trusted.

Our failure is partly a consequence of the flight from substance into proceduralism, which seeks to resolve the conflicts over moral and legal choices in the highly heterogeneous American society by “perfecting the processes of governmental decision.”<sup>1020</sup> It is also a result of the somewhat “dehumanizing tendency in [American] legal education.” Law students are

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CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* 19-20 (15th ed. 1993) (“It is for the sentencing judge to decide on a case-by-case basis which theory is to be accorded priority”). And we cannot project in our mind what the defendant will do after a long prison term. Will he be driven back into crime because his family and job connections are destroyed? See Editorial, *Out of Prison and Deep in Debt*, N.Y. TIMES, Oct. 6, 2007, at A18; Editorial, *Rational Sentencing*, N.Y. TIMES, Oct. 25, 2007, at A24 (supporting commission finding that major reform of New York’s “Byzantine system” was required).

<sup>1019</sup>WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5, at 24-25 (1972).

<sup>1020</sup>LAURENCE TRIBE, *The Pointless Flight From Substance*, in *CONSTITUTIONAL CHOICES* 10 (1985).

taught that:

A ‘good lawyer’ is a rigorous thinker who does not waste time denouncing injustice at the expense of legal analysis. It is only the insufficiently rigorous and well trained, whom legal education has inadequately ‘disciplined,’ who think that the solution to a legal problem is resolved by asking which result is more just.<sup>1021</sup>

Under the spell of such analysis, we have been seduced into ignoring the reality of human frailty and the consequences of mass imprisonment for our communities.

To pass judgment on another human being requires the engagement of the entire person’s—legal acumen, reason, and moral faculties. It is an abnegation of judicial duty to sentence with anything less.

Lincoln’s excruciating concerns over death sentences for soldiers suggests that he would have favored empathy over mechanics.

Above all, perhaps, what is required is a sense of humility in the judge and the system: “there, but for the grace of God, go I.” The judge must, in sentencing, analyze his or her own inner motivations to assure that neither cruelty nor hatred intrudes into the imposition of punishment.<sup>1022</sup> The inevitability of caprice and mistake calls for moderation.<sup>1023</sup> For each

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<sup>1021</sup>Jack M. Balkin & Sanford Levinson, *Law & the Humanities: An Uneasy Relationship*, DAEDALUS, Spring 2006, at 105, 113.

<sup>1022</sup>As Thomas Aquinas wrote,

Vengeance consists in the infliction of a penal evil on one who has sinned. Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance and rests there, then his vengeance is altogether unlawful: because to take pleasure in another’s evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men.

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If, however, the avenger’s intention be directed chiefly to some good, to be

criminal defendant is a person made up of more substance than the worst act he has ever committed.<sup>1024</sup>

Appropriate reform by limiting mandatory sentences through the Justice Breyer compromise is being replaced in many circuits (but not the Second Circuit) by limiting discretion of trial judges to ameliorate. The courts are taking a bad turn to a course they seemed recently to have abandoned when it was recognized that destruction of Black and Latino communities has resulted from our draconian sentencing scheme.

The matter of conflict among justice, mercy, and common sense is perhaps typified by a case I tried in October of 2007. The defendant was accused and found guilty of downloading child pornography. The pictures were properly seen as odious by the judge and jury. The defendant had been severely sexually abused in his childhood in an impoverished area of Sicily. He had come here with his parents when he was eleven; with only seven grades of school, he had built a valuable restaurant business, owned substantial properties, had five successful sons, a loving wife, and a grand home. Yet for some five years, he regularly repaired to a locked room over his garage to order, download, and view child-porn pictures. There was no evidence

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obtained by means of the punishment of the person who has sinned (for instance that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed.

Q. 108, "Of Vengeance," Second Part of the Second Part, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province, trans., Benziger Bros. ed. 1947) (1266-1273).

<sup>1023</sup>CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1984).

<sup>1024</sup>Bryan Stevenson, Founder & Director, Equal Justice Initiative, Commencement Speech at Bard University (May 20, 2006).

that he himself had ever sexually abused a child. The jury justifiably rejected the defense of legal insanity. He must therefore be sentenced to a minimum of five years—with a guideline sentence far higher. After the verdict, when the jurors found out about the minimum period of imprisonment, five of them declared that, had they known of the prospective sentence, they would have nullified and found him not guilty—causing at least a mistrial. They wanted treatment and close supervision to prevent a recurrence, not a long prison term. Who was right, Congress or the jury?<sup>1025</sup> I believe Lincoln would have sided with the jury.

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<sup>1025</sup>United States v. Polizzi, No. 06-0022 (E.D.N.Y. Oct. 5, 2007) (trial tr.). For a recent debate on the desirability of mandatory minimums, see 19 FED. SENT'G REP. 344-58 (2007).

## X. Conclusion

Ours is a dynamic society sociologically, economically, and technically. To remain significant, the courts must exercise power to modify the law to deal with changes in our real world. That the courts' role should be subsidiary to that of the legislatures at the federal and state levels does not excuse judges ignoring our obligations to all the people within our sphere of influence.

During our lifetime, major areas of the law necessarily have been radically restructured. Family law, securities law, labor law, discrimination law, computer and copyright law, torts, and the like have required court-assisted change. Judges must have a sense of what our society is like and where it is going during radical shifts.

We cannot ignore changes in social, economic, political, and technological matters. Judges have an important role in preventing our country from losing sight of our destination and our goals and aspirations enshrined by Lincoln. They do this by instruction and decision. In steering a course, the judge at the helm must take account of changing winds and tide.

In these last forty years as a district judge, I have had cases about abuse of women, class actions protecting Social Security disability payments, abuse of those in government institutions, school segregation, mass torts, denial of voting opportunities, unjust sentencing, and so many others. Trial judges have a wonderful window on our fascinating ever-changing world and its vastly different people.

The most vulnerable persons I have seen were often the most abused. As trial judges we see the people who need our help. The court should step in where the law allows to protect them politically and socially. The cases and issues are not abstract.

So, where does all this leave me after more than three score years as a member of the legal community? Clinging to the tiller—respect for the law and my colleagues on the bench, in the bar and at the academies. Fervently hoping that the Supreme Court’s present majority will modify its dependence on rigid theory in favor of a more generous attitude towards the needs of the people we all serve.<sup>1026</sup> Struggling to steer a straight course in the tumultuous narrow seas between the hard rock of unfeeling abstraction and the treacherous whirlpool of unrestrained empathy and compassion for those who come before me.<sup>1027</sup> Keeping my eyes fixed on Lincoln’s shining stars of, by and for the people.

And enjoying every moment because of the kindness and forbearance with my inadequacies of so many family members, teachers, colleagues, students, law clerks, and friends.

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<sup>1026</sup>Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, Sept. 27, 2007, at 92 (The present majority of Chief Justice and four justices are “bent on remaking constitutional law . . . central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed . . . aimed at reducing racial isolation and division, recapturing democracy from big money, establishing reasonable dimensions for freedom of conscience and speech, protecting women’s rights to abortion while recognizing social concerns about how that right is exercised and establishing a criminal process that is fair as well as effective.”).

<sup>1027</sup>The trial judge’s Scylla and Charybdis is roughly charted in Ruth Gavison, *Law, Adjudication, Human Rights and Society*, 40 ISR. L. REV. 31, 34 (2007) (“[T]he intermediate attitude” needs to be “much closer to the rule-of-law ideal than . . . to the justice ideal.”); see also JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 178-79 (paperback ed. 1990) (mercy based on individual judge’s sensibility is not appropriate, but as a representation of all of us (including our feelings) it is).